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No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

RICHARD BOULIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a person licensed under 18 U.S.C. 923 to engage in the business of dealing in firearms only at the premises specified in the license may, if he sells firearms which were never part of his business inventory, at a different premises, be convicted of failing to record the firearms sales as over-the-counter sales made from his business inventory at his business premises and also for failure to record the sales as mail order sales made from his business inventory at his business premises.

2. Whether a search warrant which commands the seizure of "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c)" is sufficiently particular to satisfy the requirements of the Fourth Amendment.

3. Whether an individual may be prosecuted by the United States for conduct which an agent of the United States had previously advised him was permissible.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
CONSTITUTIONAL PROVISIONS INVOLVED	vii
STATUTES INVOLVED	vii
REGULATIONS AND RULINGS INVOLVED	x
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	23
APPENDICES: (separately bound):	
A. Opinion of the Court of Appeals	1a
B. Order of the Court of Appeals Denying Petition for Rehearing	11a
C. Memorandum and Order Denying Petition of Defendant for Writ of Error Coram Nobis (July 7, 1982)	13a
D. Judgment of the District Court	19a
E. Order amending Memorandum of August 1, 1979 (October 10, 1979)	22a
F. Memorandum of Judge Murray (August 1, 1979)	23a
G. Memorandum and Order Denying Motion to Suppress (July 31, 1978)	27a

TABLE OF CONTENTS—Continued

		Page
H.	Stipulation of Facts (September 13, 1978)	36a
I.	Indictment	42a
J.	Search Warrant and accompanying affidavit	49a
K.	Letter to Senator Hayakawa from Acting Director Krogman	56a
L.	Letter of Director of BATF regarding disposition of personal firearms (April 7, 1980)	62a
M.	Form 4473 Part I	63a
N.	Form 4473 Part II	65a
O.	Partial transcript of April 7, 1978 suppression hearing	67a
P.	Partial transcript of June 9, 1978 suppression hearing	71a
Q.	Transcript of December 6, 1977 telephone conversation	74a

TABLE OF AUTHORITIES

Cases: Page

Brady v. Maryland, 373 U.S. 83 9
Cox v. Louisiana, 379 U.S. 559 22
Marron v. United States, 275 U.S. 192 21
Raley v. Ohio, 360 U.S. 423 ..... 21, 22
Stanford v. Texas, 379 U.S. 476 21
United States v. Cardwell, 680 F.2d 75 20
United States v. Currier, 621 F.2d 7 ..... 10, 16, 18
United States v. Ruisi, 460 F.2d 153 ..... 12, 13, 14
United States v. Scherer, 523 F.2d 371, *cert. denied*, 424 U.S. 91 ..... 7, 8, 10, 12, 15, 16, 18, 19

U.S. Constitution:

Amendment IV ..... vii, 21
Amendment V (Due Process Clause) ..... vii, 21

Statutes:

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, amended by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 Title IV, 18 U.S.C. 921 *et seq.*:

18 U.S.C. 921(a) vii
18 U.S.C. 921(a)(11) vii
18 U.S.C. 922(a) ..... vii, 14
18 U.S.C. 922(a)(1) ..... vii, 18
18 U.S.C. 922(c) ..... vii, 5, 6, 12, 13, 21
18 U.S.C. 922(m) ..... ix, 5
18 U.S.C. 923 ..... ix, 18
18 U.S.C. 923(a) ..... ix, 14
18 U.S.C. 923(d)(1)(E) ix
18 U.S.C. 923(g) ..... ix, 13, 14, 16, 19
18 U.S.C. 923(h) ..... x, 14
18 U.S.C. 924 x
18 U.S.C. 924(d) ..... x, 20
18 U.S.C. 926 x

Regulations and Rulings:

27 C.F.R. 178.41 x
27 C.F.R. 178.41(b) x

TABLE OF AUTHORITIES—Continued

Page

27 C.F.R. 178.50 ..... xi, 3, 14, 18
27 C.F.R. 178.96 ..... xi, 5, 12
27 C.F.R. 178.96(a) xi
27 C.F.R. 178.96(b) xi
27 C.F.R. 178.124 ..... xii, 5, 19
27 C.F.R. 178.124(a) ..... xii, 6, 13
27 C.F.R. 178.124(c) ..... xii, 6
27 C.F.R. 178.125 ..... xii, 5, 19
27 C.F.R. 178.125(e) xii

your 1977 guide to—FIREARMS REGULATION

Questions and answers on federal gun control, Bureau of Alcohol, Tobacco and Firearms (ATF P 5300.5 (6-77) ..... xiii, 14, 22

Revenue Ruling 69-59—*Internal Revenue Cumulative Bulletin 1969-1* ..... xiv, 14
Industry Circular 72-30 ..... xiv, 8, 16, 17, 19

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES INVOLVED

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, provides in pertinent part:

18 U.S.C. 921. **Definitions**

(a) As used in this chapter—

* * * *

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail. . . .

18 U.S.C. 922. **Unlawful Acts**

(a) It shall be unlawful—

(1) for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms or ammuntion. . .

* * * *

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

> "Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are ——————————— Signature ——————— Date ———————."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with

evidence of receipt or rejection of that notification shall be retained by the licensee as part of the records required to be kept under section 923(g).

* * * *

(m) It shall be unlawful for any . . . licensed dealer . . . knowingly . . . to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

* * * *

18 U.S.C. 923. **Licensing**

(a) No person shall engage in business as a firearms . . . dealer until he has filed an application with, and received a license to do so from, the Secretary. . . . Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business. . .

(d) (1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

* * * *

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time. . .

* * * *

(g) Each . . . licensed dealer . . . shall maintain such records of importation, . . shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such . . . dealers . . . shall make such records available for inspection at all reasonable times. . . . The Secretary may enter during business hours the premises (including place of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept by such . . . dealer . . . under the provisions of

this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises. . .

(h) Licenses issued under the provisions of . . . this section shall be kept posted and kept available for inspection on the premises covered by the license.

• • • •

18 U.S.C. 924. **Penalties**

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture. . .

• • • •

18 U.S.C. 926. **Rules and regulations**

The Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter. . .

REGULATIONS AND RULINGS INVOLVED

Regulations prescribed pursuant to 18 U.S.C. 926 provide in pertinent part:

27 C.F.R. 178.41 **General**

• • • •

(b) Each person intending to engage in business as a firearms . . . dealer shall file an application, with the required fee. . . . A separate license must be obtained for each business and each place at which the applicant is to do business. Such license shall . . . entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce, and to engage in the business specified by the license, at the location described on the license. . .

• • • •

27 C.F.R. 178.50 **Locations covered by license**

The license covers the class of business or the activity specified in the license at the address described therein. Accordingly, a separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted; however, no license is required to cover a separate warehouse used by the licensee solely for storage of firarms or ammunition if the records required by this part are maintained at the licensed premises served by such warehouse. . .

27 C.F.R. 178.96 **Out-of-State and mail order sales**

(a) The provisions of this section shall apply in any case where a firearm purchased by or delivered to the person so receiving the firearm is not otherwise prohibited by the Act or this part.

(b) A . . . licensed dealer may sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises if the nonlicensee is a resident of the same State in which the licensee's business premises are located, and the nonlicensee furnishes to the licensee the firearms transaction record, Form 4473, required by ¶ 178.124. The nonlicensee shall attach to such record a true copy of any permit or other information required pursuant to any statute of the State and published ordinance applicable to the locality in which he resides. The licensee shall prior to shipment or delivery of the firearm, forward by registered or certified mail (return receipt requested) a copy of the record, Form 4473, to the chief law enforcement officer named on such record, and delay shipment or delivery of the firearm for a period of at least 7 days following receipt by the licensee of the return receipt evidencing delivery of the copy of the record to such chief law enforcement officer, or the return of the copy of the record to him due to the refusal of such chief law enforcement officer to accept same in accordance with U.S. Postal Service regulations. . .

27 C.F.R. 178.124 **Firearms transaction record**

* * * *

(a) A . . . licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, . . . unless he records the transaction on a firearms transaction record, Form 4473:

* * * *

(c) Prior to making an over-the-counter transfer of a firearm to a nonlicensee who is a resident of the State in which the licensee maintains his business . . . premises, the . . . licensed dealer . . . so transferring the firearm shall obtain a Form 4473 from the transferee showing the name, address, date and place of birth, height, weight, and race of the transferee, and certification by the transferee that he is not prohibited by the Act or Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 236; 18 U.S.C. Appendix) from receiving a firearm in interstate or foreign commerce. The licensee shall identify the firearm to be transferred by listing in the Form 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm. Before transferring the firearm described in the Form 4473, the licensee (1) shall cause the transferee to identify himself in any manner customarily used in commercial transactions (e.g., a driver's license), and shall note on the form the method used, and (2) if satisfied that the transferee is lawfully entitled to receive the firearm, shall sign and date the form.

* * * *

27 C.F.R. 178.125 **Record of receipt and disposition**

* * * *

(e) ***Firearms receipt and disposition.*** Each licensed dealer . . . shall on and after the effective date of this part enter into a permanent record each receipt and disposition of firearms. . . . The record required by this

paragraph shall be maintained in bound form. . . The record shall show the date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type of action, and the caliber or gauge of the firearm. . . . The sale or other disposition of a firearm . . . shall be recorded by the licensed dealer . . . not later than seven days following the date of such transaction. When such disposition is made to a nonlicensee, the firearms transaction record, Form 4473, obtained by the licensed dealer . . . shall be retained, until the transaction is recorded, separate from his Form 4473 file and be readily available for inspection.

your 1977 guide to—Firearms Regulation, Bureau of Alcohol, Tobacco and Firearms, Questions and Answers Pertaining to Federal Firearms Laws and Regulations:

(33) Is a Form 4473 needed in the private sale of firearms by a nonlicensee?

No. Form 4473 is required only for sales by a licensee. (178.124)

(34) Does a dealer have to execute Form 4473 to take a weapon out of his saleable inventory for his own use?

Yes, such a transfer is treated as any other transfer to a nonlicensed person. (178.124)

* * * *

(59) May firearms and ammunition be sold at a gun show?

Yes, within the following framework, provided local ordinances are not violated and excepting NFA weapons.

A LICENSED FIREARMS DEALER MAY:

1. Display and take orders for firearms and ammunition. Orders must be filled only at the dealer's licensed premises. . . .

A NONLICENSED RESIDENT OF THE STATE IN WHICH THE SHOW IS BEING HELD MAY:

1. Make an occasional sale of a firearm to another nonlicensee residing in his State (as long as he is not "engaging in the business.")...

Revenue Ruling 69-59 states, in pertinent part:

> ... Under 18 U.S.C. 923(a), "a separate fee" is required to be paid for each place at which business as a licensee is to be conducted. Further, each applicant for a license is required to have in a State "premises from which he conducts business" (18 U.S.C. 923(d)(1)(E)) and to specify such premises in the license application. In addition, records are required to be maintained at the business premises covered by the license (18 U.S.C. 923(g)).
>
> Therefore, a person holding a valid license may engage in the business covered by the license only at the specific business premises for which his license has been obtained. Thus, a licensee may not sell firearms or ammunition at a gun show held on premises other than those covered by his license.

Industry Circular 72-30 provides:

Identifying personal firearms

Guidelines for Identifying Personal Firearms on the Business Premises of Licensed Dealers. A presumption exists that all firearms on a business premises are for sale and accordingly must be entered in the records required to be maintained under the law and regulations. However, it is recognized that some dealers may have personal firearms on their business premises for purposes of display or decoration and not for sale. Firearms dealers who have such personal firearms on licensed premises should not intermingle such firearms with firearms held for sale. Such firearms should be segregated from firearms held for sale and appropriately identified (for example, by attaching a tag) as being "not for sale". Personal firearms

on licensed premises which are segregated from firearms held for sale and which are appropriately identified as not being for sale need not be entered in the dealers records.

There may be occasions where a firearms dealer utilizes his license to acquire firearms for his personal collection. Such firearms must be entered in his permanent acquisition records and subsequently be recorded as a disposition to himself in his private capacity. Form 4473 shall be prepared and executed for these transactions. If such personal firearms remain on the licensed premises, the procedures described above with respect to segregation and identification must be followed.

The above procedures will facilitate the examination and inspection of the records of firearms dealers and result in less inconvenience to licensees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

RICHARD BOULIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Richard Boulin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-10a) is unreported. The opinion of the district court (App. F, *infra*, 23a-26a) finding Petitioner guilty on stipulated facts is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1983 and a timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on July 15, 1983 (App. B, *infra*, 11a-12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 25, 1977, the Petitioner, a resident of Maryland, set up a table at the J & S Wildcat Gun Show in the Baltimore Civic Center, Baltimore, Maryland, displayed firearms for sale, and sold and transferred three firearms, which he then owned, to Gordon William Schoen, also a Maryland resident. On October 1, 1977, Petitioner set up a table at the Greenbelt Gun Show, in the Greenbelt National Guard Armory, Greenbelt, Maryland, displayed firearms for sale, and sold and transferred one of his firearms to Schoen. On November 5, 1977, Petitioner set up a table at the Greenbelt Gun Show in the Greenbelt National Guard Armory, displayed firearms for sale, and sold and transferred a fifth firearm to Schoen.[1] (App. H, *infra*, 36a-41a)

At the time he sold the firearms at the Baltimore Civic Center and at the Greenbelt National Guard Armory, Petitioner did not have a license to engage in the business of dealing in firearms at either premises, as required by 18 U.S.C. 923, nor had he applied for such a license for either premises. (App. H, *infra*, 39a)

Petitioner did, however, have a license issued by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (BATF) which authorized him to engage in the business of dealing in firearms only at 9112 Penn-

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[1] The firearms sold at the Baltimore Civic Center were: a Lugar 9mm semi-automatic pistol, a Colt .25 caliber semi-automatic pistol and a Browning .22 caliber semi-automatic rifle. At the first Greenbelt National Guard Armory show, a Colt .357 magnum caliber revolver was sold; at the second show, a Colt Python .357 magnum revolver was sold. The indictment, as returned, also contained charges, in Counts 5, 6 and 13, based on the sales of a Smith & Wesson revolver and a High Standard pistol to Schoen on October 1, 1977, in the Greenbelt National Guard Armory. These three counts were dismissed on motion of the Government. The case, as submitted to the District Court on facts stipulated by the government and the defendant, concerned the sales of only five firearms. (App. H, *infra*, 36a-41a)

sylvania Avenue, Silver Spring, Maryland. (App. H, *infra*, 37a). With the consent of that Bureau, and as permitted by 27 C.F.R. 178.50, Petitioner stored his inventory of firearms for his licensed business, known as Commemoratives Unlimited, at 8700 Hawkins Creamery Road, Gaithersburg, Maryland, his home address. (App. O, *infra*, 67a-68a). In connection with his firearms business, Petitioner maintained a Dealers' Firearms Record Book to record the identities of the firearms acquired by and disposed of by his business. The five firearms stipulated as having been sold to Schoen were not entered in his Dealers' Firearms Record Book, having never been acquired by Petitioner's business. At no time did Schoen ever appear at the business premises where Petitioner was authorized by his federal license to do business. (App. H, *infra*, 39a-40a).

After each sale of firearms by Petitioner to Schoen, the latter delivered the purchased firearms to Special Agent William J. McMonagle of the BATF. (App. H, *infra*, 37a-38a). On December 12, 1977, based upon an affidavit submitted by that agent, a United States Magistrate issued two search warrants. One commanded the search of the premises at which Petitioner was licensed to conduct his firearms business and the other commanded a search of Petitioner's home. Each warrant recited the Magistrate's satisfaction that there was probable cause to search both places and seize certain property identified only as "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c)."

Special Agent McMonagle's affidavit recounted the purchase of seven firearms at the gun shows, made under his guidance and control by Schoen from Petitioner, who had identified himself as a federally licensed firearms dealer trading as Commemoratives Unlimited, 9112 Pennsylvania Avenue, Silver Spring, Maryland. McMonagle stated that with Schoen's consent, all the aforemen-

tioned transactions were monitored and recorded by McMonagle by means of an electronic device placed on Schoen's person, but that due to technical difficulties, portions of each transaction were inaudible. (App. J, *infra*, 52a-55a)

McMonagle's affidavit then recited:

> On or about December 6, 1977, Gordon William Schoen stated to your affiant that during some but not all of the aforementioned firearms transactions, he completed some federal firearms forms. However, Mr. Schoen was not sure of just how many forms he completed.
>
> On December 7, 1977, Gordon William Schoen stated to your affiant that on December 6, 1977, he telephoned Richard Boulin at 253-6133 and told him that on Wednesday, December 14, 1977, he (Schoen) would be in the market to buy more firearms "off paper." According to Mr. Schoen, Mr. Boulin said that he would sell Mr. Schoen numerous firearms the same way he did before (referring to selling them without paperwork). Boulin said that the guns are presently being stored at his residence, 8700 Hawkins Creamery Road, Gaithersburg, Maryland, and that they would be there on Wednesday, December 14, 1977, when Schoen went there to buy them. Mr. Boulin then proceeded to give Mr. Schoen directions to his (Boulin's) residence at 8700 Hawkins Creamery Road, Gaithersburg, Maryland.

The following was added as a footnote at the end of the affidavit:

> Subsequent to each controlled purchase of firearms Gordon William Schoen stated to your affiant that during the purchase of said firearms, he did not execute any sworn statements as prescribed by the (sic) Title 18 U.S.C. Section 922(c).

Unlike the three prior attempts at electronic monitoring, the December 6, 1977 telephone conversation between Schoen and Boulin had been very successfully recorded, by special Agent McMonagle. (App. Q, *infra*, 74a-82a)

On December 14, 1977, Special Agents of the BATF executed the search warrants for Petitioner's business premises and residence. Nothing was seized at the business premises but at Petitioner's residence the agents seized 83 firearms, 5,765 rounds of ammunition, and various firearms records, including Petitioner's Dealers' Firearms Record Book, Dealers' Ammunition Record Book and a Personal Weapons Transaction Log.[2] (App. G, *infra*, 27a-28a)

The Grand Jury for the District of Maryland returned a thirteen count indictment against Petitioner on December 20, 1977. Count One charged:

> On or about the 25th day of September, 1977, in the State and District of Maryland, RICHARD BOULIN being a licensed dealer in firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one 9mm Lugar semi-automatic pistol, serial number on barrel 7318, on frame 4907, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.[3]

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[2] The Personal Weapons Transactions Log was not required to be maintained by regulations prescribed pursuant to the Gun Control Act and therefore not governed by the provisions of 18 U.S.C. 922(m). 27 C.F.R. 178.124 and 178.125 specify the records which are required to be maintained by a licensed dealer.

[3] The requirements of 18 U.S.C. 922(c) are complied with by a dealer when he and the transferee of a firearm execute Part II of Form 4473, entitled "Firearms Transaction Record." 27 C.F.R. 178.96 (App. N, *infra*, 65a) Part II of Form 4473 is labeled as being for "Contiguous State or Non-Over-The-Counter" sales or transfers. Section A must be completed by the transferee (buyer) and Section B must be completed by the transferor (seller). The instructions on the reverse side of the Form state that the "form should not be used for sales or transfers when neither person is licensed under" the Gun Control Act. "Non-Over-The-Counter Transaction" is defined in the instructions as a "*mail order trans-*

The language in Counts 2, 3, 4 and 7 is identical to Count One except that the sales charged were of the other four firearms mentioned in the stipulation.

Count Eight of the Indictment charged:

> On or about the 25th day of September, 1977, in the State and District of Maryland, RICHARD BOULIN being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 U.S.C. 923 and 27 C.F.R. ¶ 178.124(a) in that he sold and disposed of one 9 mm Lugar semi-automatic pistol, serial number on barrel 7318, on frame 4907, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.[4]

The language in counts nine through twelve is identical except that the sales charged were of the other four firearms stipulated as having been sold by Petitioner to Schoen.

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action to a resident of the State in which the transferor's (seller's) premises are located." (emphasis added) (App. N, *infra*, 66a). Printed in Section A is an affidavit containing the language specified in 18 U.S.C. 922(c).

[4] Form 4473 is entitled "Firearms Transaction Record." Part I is labeled as being for "Intrastate-Over-The-Counter" sales or transfers. Section A of Part I must be completed by the transferee (buyer) and Section B must be completed by the transferor (seller). (App. M, *infra*, 63a) The instructions on the reverse side of the form state that "this form should not be used for sales or transfers where neither person is licensed under" the Gun Control Act. "Intrastate-Over-The-Counter Transaction" is defined as the "sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the state in which the transferor's business is located, *occurring on the transferor's business premises*." (emphasis added) (App. M, *infra*, 64a). 27 C.F.R. 178.124(c), requiring the execution of Form 4473 for over-the-counter transfers, was cited below the charging paragraphs of Counts Eight through Twelve. 27 C.F.R. 178.124(a) is a general requirement that Form 4473 be prepared for any sale or other disposition of a firearm.

On January 13, 1978, Petitioner moved, under Rule 41(e) of the Federal Rules of Criminal Procedure, for the return of all property seized and under Rule 12 for suppression of the use of such property as evidence at trial. The District Court heard testimony on the motions on April 7, June 9, and June 19, 1978; on July 31, 1978, it denied the motions. The Court said it was adopting the reasoning of *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), in rejecting Petitioner's contention that it was not necessary that he record these sales since they were of firearms from his personal collection, as distinguished from his business inventory, as recorded in his Dealers' Firearms Record Book. (App. G, *infra*, 32a-33a)

In answering Petitioner's argument that the mere fact that he sold five guns from his personal collection is insufficient to establish that he intended to sell guns illegally in the future, the Court relied on the affidavit of McMonagle, which in turn relied on Schoen's statement that during his telephone conversation of December 6, 1977 with Petitioner, he told Petitioner that he would be in the market to buy more firearms "off paper" and that Petitioner agreed to sell numerous firearms "the same way he did before." According to McMonagle's affidavit, the words "the same way he did before" constituted a reference to selling them without paperwork.[5] The Court also rejected Petitioner's claim that the items to be seized were not described in the warrant with sufficient particularity, citing *Scherer, supra.* (App. G, *infra*, 34a-35a).

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[5] McMonagle admitted during his testimony at the suppression hearing on June 9, 1977, that the transcript of this telephone conversation (App. Q, *infra*, 74a-82a) reflected that Schoen did not make the statement that he would be in the market to buy more firearms "off paper". He said the affidavit reflected what Schoen told him and that he, McMonagle, had not read the transcript of the telephone conversation at the time he executed the affidavit. (App. P, *infra*, 71a-73a)

On October 10, 1979, based on the stipulated facts in the case, District Judge Herbert L. Murray found Petitioner guilty on all remaining counts of the indictment, again relying on *Scherer* in rejecting Petitioner's contention that he was not required, in connection with the sales of the firearms at the Baltimore Civic Center and the Greenbelt National Guard Armory, to create the records specified in 18 U.S.C. 922(c) and prescribed regulations. (App. E, F, *infra*, 22a-26a)

On February 12, 1980, Petitioner filed a Petition for a Writ of Error Coram Nobis. He reiterated what he had previously testified to during the hearing on his motion to suppress, that he had been advised by an Inspector of the BATF, prior to the sales upon which his conviction was based, that when he made private sales of his personal firearms to residents of Maryland, he need not comply with the recording requirements of the Gun Control Act and regulations prescribed pursuant thereto. Petitioner also pointed out that the Government had never disputed that Petitioner had been given this advice, nor even addressed the subject. Petitioner then called to the Court's attention a letter dated July 30, 1979, to Senator S. I. Hayakawa, from the then Acting Director of the BATF, John C. Krogman (App. K, *infra*, 56a-61a) which stated, *inter alia*:

> ATF recognizes that a licensee may maintain a private collection of firearms independent of the business inventory and lawfully dispose of such firearms without entering the transaction in the licensee records.

Mr. Krogman's letter then discussed the requirements of Industry Circular 72-30, which recognizes the distinction between personal firearms and firearms held for sale on the licensee's business premises, and concluded by stating that the "licensee's subsequent sale of such personal firearms need not be recorded in the business records and a Form 4473 executed by the purchaser would not be required." Petitioner stressed that Mr. Krogman's letter

confirmed that ATF inspectors had correctly advised Petitioner. Petitioner then argued that the Government's failure to acknowledge BATF's interpretation should estop it from proceeding with the prosecution and also that the Government's failure to disclose the Krogman letter violated the rule expressed in *Brady* v. *Maryland*, 373 U.S. 83 (1963).

On July 7, 1982, the District Court denied Petitioner's Petition for a Writ of Error Coram Nobis. The Court found no legal basis for the estoppel argument and expressed the belief it would have found Petitioner guilty even if the Court had been aware of the Krogman letter, stating:

> In finding Petitioner guilty under 18 U.S.C. § 922(m), the court adopted the reasoning in *United States v. Scherer* . . . and found that a federally licensed firearms dealer must comply with the record keeping requirements when selling firearms from his personal collection. Petitioner also was found guilty of a violation of 18 U.S.C. 922(c) which provides that a "licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer or dealer)" only if the dealer obtains a sworn statement of intent from the transferee or delays delivery of the firearms for at least seven days. Certainly the Krogman letter does not address *the requirements of a statement of intent or delay when weapons are sold away from business premises* and therefore the Court's finding of Petitioner's guilt under 18 U.S.C. § 922(c) would remain unchanged.[6] (App. C, *infra*, 16a) (emphasis added)

The Court, in its opinion, also referred to a letter to Government counsel dated April 7, 1980, from the then Director of the BATF, G. R. Dickerson, which stated

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[6] This statement clearly reflects Judge Murray's erroneous belief that a federally licensed firearms dealer is permitted to do business as a dealer away from his business premises.

that Mr. Krogman's conclusion about the disposition of personal firearms was incorrect (App. L, *infra*, 62a). The Government had placed the letter in evidence, together with an enclosure to the letter, an ATF document identified as ATF P 5300.15 (5/78) entitled "Federal Firearms Licensee Information." In his letter, Mr. Dickerson specifically relied on a sample firearms acquisition and disposition record with sample entries as illustrating ATF's position that a federal licensee's disposition of personal firearms must be recorded. The sample entry, however, deals with the sale of a firearm by a dealer to an out-of-state policeman and refers dealers to instructions on sales to law enforcement officers.

The Fourth Circuit affirmed Petitioner's conviction on April 12, 1983, with Chief Judge Winter dissenting. (App. A, *infra*, 1a-10a) A Petition for Rehearing was denied on July 15, 1983. (App. B, *infra*, 11a-12a) In affirming Petitioner's conviction, the Fourth Circuit rejected the distinction between sales made from a dealer's private gun collection instead of his business inventory, relying on *Scherer*, *supra*, and *United States* v. *Currier*, 621 F.2d 7 (1st Cir. 1980), which also relied upon *Scherer*.[7] The Court further held that since 18 U.S.C. 922(c) "allows a licensed gun dealer to sell a weapon to a person who does not appear at his business premises if various reports are made," Petitioner was properly indicted under this section. (App. A, *infra*, 6a) The Fourth Circuit said it agreed with the District Court's finding that Petitioner did not rely on the advice received by an "unidentified BATF Agent"[8] concerning recording require-

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[7] In following *Scherer*, the First Circuit stated, "This holding is without doubt correct; otherwise, the federal regulations could be circumvented altogether by dealers who were slick enough to establish 'personal collections' for otherwise unlawful sales." 621 F.2d at 9. There were no charges based on 18 U.S.C. 922(c) in either the *Scherer* case or the *Currier* case.

[8] The Bureau could have identified the agent through its records if it had wished to controvert Petitioner, who testified concerning this advice on April 7, 1978, at the suppression hearing. He said

ments since, although he failed to record the sales to Schoen, he did record some sales of personal firearms. The Court did not identify these sales.[9] The Court also rejected any reliance on the letter from Acting Director Krogman, stating that "it is only an interpretation of the law and not a fact material to issues of guilt or punishment." (App. A, *infra*, 7a) The Court also concluded that "the recorded conversations and stipulated facts" were determinative of Petitioner's guilt or innocence. (App. A, *infra*, 7a)

The Fourth Circuit also rejected Petitioner's contention that the warrant was unsupported by probable cause, stating that the affidavit detailed a series of weapons transactions and related a telephone conversation which raised the prospect of further sales without the furnishing of completed forms.[10] Finally, the Court found that the "description of the items set forth in the warrant fell within the 'margin of flexibility' necessary for meeting the injunction of specificity under the Fourth Amendment." (App. A, *infra*, 8a)

REASONS FOR GRANTING THE PETITION

1. This case raises an extremely important question concerning the construction of the Gun Control Act of 1968, since the Fourth Circuit's holding could undermine one of the most important features of the congressional

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the conversation took place six or eight months after he got his license when the agent came to inspect his records and inventory. (App. O, *infra*, 68a)

[9] In its opinion, the Fourth Circuit mentions pointedly, on several occasions, that Petitioner failed to, or did, record sales to Schoen in his "personal weapons log." The impression is therefore given that the Court may have been under the erroneous belief that this log was an official record or that Petitioner was required to record sales in the log.

[10] The Court apparently failed to appreciate that the transcript of the December 6, 1977, telephone conversation did not confirm Schoen's statement as reported in McMonagle's affidavit, but disagreed with it. See footnote 5, *supra*.

scheme embodied in the Act, and the regulations prescribed pursuant to it: the requirement that a licensed federal firearms dealer conduct business only at the premises specified in his license. Under the holding of the Fourth Circuit, licensed federal firearms dealers could become itinerant mechants, moving from place to place, such as at gun shows, to market their wares, provided a Form 4473 was completed for each firearm sold. This places the Fourth Circuit squarely in conflict with the Second Circuit, which held in *United States v. Ruisi*, 460 F.2d 153 (1972) that a federal firearms dealer, licensed to do business at one premises, could be convicted of engaging in the business of dealing in firearms without a license if he sold firearms at another location. That case, like the instant case, involved sales at a gun show by a dealer licensed to do business at a location other than the gun show.

The Fourth Circuit's decision is based upon a fundamental misinterpretation of the Gun Control Act, encouraged by reliance upon the seriously flawed opinion of the Seventh Circuit in *Scherer*, *supra*. The fundamental misinterpretation is in the conclusion that a licensed federal firearms dealer may engage in business at locations other than his licensed premises, provided that he maintains certain records. To reach this conclusion, the Fourth Circuit misinterpreted the phrase "a licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises," contained in 18 U.S.C. 922(c), to mean that a licensee may leave his business premises to make sales. This section contemplates, however, as is clear when it is read in conjunction with other sections of the Gun Control Act and accompanying regulations, that the licensee remain at his premises but be authorized to sell to nonlicensee customers who do not appear in person at the premises. 27 C.F.R. 178.96 This is the reason that Part II of Form 4473, which must be completed when a § 922(c) sale is made, is labeled by BATF as applicable to "mail order" sales and "Non-Over-

The-Counter" sales as distinguished from "Over-The-Counter" sales.[11]

Petitioner's convictions under Counts One through Four and also Count Seven, are based upon allegations that he failed to comply, when he sold five firearms to Schoen, with 18 U.S.C. 922(c), which compliance is accomplished by completing Part II of Form 4473, relating to non-over-the-counter or mail order sales. On the other hand, his conviction on Counts Eight through Twelve, in connection with the same five sales, are based on allegations that he failed to comply with 18 U.S.C. 923(g) and 27 C.F.R. 178.124(a), which compliance is accomplished by completing Part I of Form 4473, relating to over-the-counter sales. The inconsistency in the Government's theory of its case is not, however, its only fatal deficiency since, even if Petitioner had completed either Part I or Part II of Form 4473 for the sales at the gun shows, he would have been subject to prosecution for dealing in firearms without a license, in accordance with the holding in *Ruisi, supra.* In that case, the president and an employee of a corporation which was licensed to deal in firearms at two stores in Manhattan, New York, sold eleven guns at a weekend gun show in a union hall on Long Island. They required each purchaser to fill out Form 4473. Neither individual nor the corporation had a license to deal in firearms at the union hall where the show was held nor, as the Second Circuit pointed out, would it have been possible for them to obtain such a license. The district court, after a non-jury trial, ruled

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[11] Under the terms of 18 U.S.C. 922(c), these mail order sales are permitted only "[i]n any case not otherwise prohibited" by the Act. A licensee could not, therefore, for example, make a mail order sale to a person who resides in a state other than the licensee's. The requirements that the buyer furnish an affidavit and that the chief law enforcement officer where the buyer resides be notified of the purchase, are obviously substitutes for the ordinary methods used to identify a buyer, when he appears in person at a dealer's premises to purchase over-the-counter.

that the defendants "on behalf of the corporation were engaged in the sale of firearms at that [gun] show, and thus violated the statute [18 U.S.C. 922(a)(1)] by engaging in the business of dealing in firearms without a license." The Court of Appeals affirmed, holding that the record contained overwhelming evidence to support the district court's finding. 460 F.2d at 155.

The decision in *Ruisi* comports with the fixed premises scheme evident from an examination of 18 U.S.C. 922(a), which makes it unlawful to deal in firearms without a license; 18 U.S.C. 923(a), which requires a separate license for each premises; 18 U.S.C. 923(g), which permits warrantless inspection of the dealer's licensed premises; and 18 U.S.C. 923(h), which requires that the dealer's license be posted on the premises.

Moreover, 27 C.F.R. 178.50 provides in pertinent part:

> **Locations Covered by License**
>
> The license covers the class of business or the activity specified in the license at the address described therein. Accordingly, *a separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted; however, no license is required to cover a separate warehouse used by the licensee solely for storage of firearms or ammunition* if the records required by this part are maintained at the licensed premises served by such warehouse. . . . (emphasis added)

Further, BATF has clearly informed dealers, through its publication, *your 1977 guide to—Firearms Regulations*, published for the benefit of dealers, that sales away from their licensed premises, such as at gun shows, are not permitted by the Gun Control Act. Revenue Ruling 69-59 also emphasizes that "a licensee may not sell fire-

arms or ammunition at a gun show held on premises other than those covered by his license."

The actual holding in *Scherer, supra*, upon which both the District Court and the Fourth Circuit relied to sustain Petitioner's conviction, is not as broad as those courts believed. Sherer was convicted of failing to maintain a Firearms Acquisition and Disposition Record and failing to complete Form 4473 in connection with certain sales of firearms. In describing Scherer, the Seventh Circuit said that he was a licensed firearms dealer who "maintains an office connected to a barn on his property from which he is licensed to conduct his firearms business" in Hampshire, Illinois. 523 F.2d at 371. A Government informant purchased four firearms from Scherer and "[n]one of these transactions occurred at Scherer's formal business office. . . ." *Id* at 371. Scherer alleged that he was exempt from the recording provisions of the Gun Control Act because the sales listed in the indictment occurred at locations other than his licensed business premises. Three sales occurred inside Scherer's house, while the transfer of a fourth firearm took place at a gun show in Palatine, Illinois. Since he was not licensed to deal at any of the locations mentioned, Scherer argued that he was not a federally licensed firearms dealer as to those places and thus not subject to the record keeping requirements. To this argument, the Seventh Circuit replied:

> *Initially, we cannot agree that all of the gun sales did not occur on Scherer's business premises.* The house where the bulk of these transactions took place was a mere eighty feet from the defendant's office and located on the same property. Scherer's status as a licensed firearms dealer and the responsibilities that attend to that title do not end with a mere step outside the door. (emphasis added)

The Seventh Circuit thus found that the sales in the *Scherer* case were made on the premises at which Scherer

was licensed to deal in firearms. Under such circumstances, it is clear that his sales of firearms were subject to the record-keeping provisions of the Gun Control Act. It is equally clear that under those circumstances the Seventh Circuit's holding did not have the effect of authorizing itinerant dealing in firearms, as does the Fourth Circuit's decision in this case. It was therefore *dictum* when the *Scherer* court decided that a licensed dealer was required to record the disposition of a firearm owned in his private capacity, when the disposition is made away from his business premises. 523 F.2d at 374.

2. It is imperative that the Government and the Courts of Appeals receive the guidance of this Court concerning the proper construction of the technical record-keeping provisions of the Gun Control Act. The First Circuit in *Currier*, *supra*, and now the Fourth Circuit in the instant case, have adopted *Scherer's* shallow reasoning and it is apparent that the Government will continue to initiate prosecutions based on the same reasoning. It is also apparent, from an examination of the recordkeeping provisions of the Gun Control Act, that such felony prosecutions are without legal justification.

18 U.S.C. 923(g) and its accompanying regulations require that records of acquisition and disposition be kept by licensed importers, manufacturers, and dealers to identify the firearms in their possession. The possessor of each firearm handled by a licensee, until its first disposition by a dealer, can therefore be ascertained from licensee records. Paragraph One of Industry Circular 72-30 (distributed to licensed dealers by BATF) recognizes this scheme and the consequence thereof, i.e., that the Gun Control Act ordinarily requires a dealer to enter into his records any firearm on his licensed premises since the business is in possession of the firearm and its records should reflect that fact. The Circular, therefore, sets out a means by which a licensed dealer can show the distinction between firearms not for sale by the business and

those which are for sale, so that personal firearms will not be considered acquisitions by the business, despite their presence on the business premises. When so distinguished, by being segregated and identified as personal firearms, they need not be entered in the dealer's records.

Paragraph Two of the Industry Circular further emphasizes the distinction between business and personal firearms. It provides that when a dealer uses his license to acquire a firearm, even though destined for his personal collection, the business is shown in the records as the entity which made the "acquisition" of the firearm. Thereafter, the dealer may record a subsequent "disposition" to himself and take possession of the firearm in his "private capacity." Thus, the chain of physical possession of the firearm is recorded in conformity with the Gun Control Act. This is a clear recognition of the Act's important distinction between firearms possessed by the business of the dealer and those possessed in his private capacity. Were there no such distinction, there would be no need to record the disposition by the business to the dealer in his "private capacity" or to prepare the Form 4473 showing the transfer.[12]

Similarly, nothing in the Act suggests that after the disposition to "himself in his private capacity" the dealer, in his private capacity, has fewer rights with regard to the firearm than any other private person, including the right to sell the firearm. Just as any other private party may transfer a firearm to another private party residing in his state, without a record being made of the transaction by a dealer, so may a dealer when acting in his private capacity. An individual, in other words, acquires certain privileges by becoming a licensed dealer but does

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[12] The Form 4473 must be prepared by the dealer since his business must treat "himself in his private capacity" as the business would treat any other transferee. The firearms involved in this case, however, were never a part of Petitioner's business inventory but were always possessed by Petitioner in his "private capacity."

not forfeit any of the individual rights he may exercise in his private capacity. This distinction between business inventory and personally owned firearms is also recognized by the letter dated 30 July 1979 from then Acting Director John G. Krogman to Senator Hayakawa, *supra*. (App. K, *infra*, 56a-61a)

The answer to an objection that a "slick" dealer might transfer many, or perhaps all, firearms from the business to himself in his private capacity and then make unrecorded sales of them *at his business premises*, is that such a dealer would be subject to prosecution under the Act for failure to enter such firearms into his business records as acquisitions because firearms possessed by the dealer on his business premises *for sale* must be entered in his records. Moreover, when such firearms are disposed of, their disposition by the business must be recorded, thereby subjecting the dealer to prosecution if he fails to record the disposition. If a dealer sold or otherwise transferred firearms in his private capacity *away from his business premises*, and the firearms had either been originally acquired by him in his private capacity or disposed of to himself by his business, he would be subject to prosecution for selling firearms without a license in violation of 18 U.S.C. 922(a)(1).[13] He could not defend his actions by relying on the fact that he possessed a license since 18 U.S.C. 923 and 27 C.F.R. 178.50 require that a separate license be obtained for each location at which a firearms or ammunition activity requiring a license is conducted.

The decision in *Scherer* also is incorrect because the distinction between "personal" and "business" transactions, far from being arbitrary, as the Seventh Circuit stated, is one of the Act's most important distinctions.

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[13] This is the point that the First Circuit failed to grasp in *United States* v. *Currier*, *supra*, when it suggested that "slick" dealers could establish personal collections for otherwise unlawful sales. (Footnote 7, *supra*)

Indeed, this distinction is recognized in paragraph Two of Circular 72-30, which *Scherer* did not quote, even though it set out paragraph One in full. Moreover, it simply does not comport with the history, purpose, or internal logic of the Act to hold that the mere selling of a firearm brings it and the parties involved within the purview of the Act. Indeed, once a firearm is disposed of to a nonlicensed person, the Act's record-keeping requirements for that firearm have been satisfied and the nonlicensed individual need not make a record of any subsequent disposition, nor is he required to make the transaction through a licensed dealer, to ensure that there is a record of it. Although, as *Scherer* stated, the statutes and regulations refer to "any firearm" and "each disposition," it is evident from the text of 18 U.S.C. 923(g) and 27 C.F.R. 178.124 and 178.125 that "any firearm" refers to any firearm possessed by the business and "each disposition" refers to each disposition by the business.

The *Scherer* court's statement at p. 374 that "it is immaterial whether the weapons sold were originally acquired for Scherer's personal use or for business purposes" misses the point. The purpose of the acquisition is not the governing factor but rather the status of the firearm at the time of the transaction, i.e., whether it was possessed by the business or by the dealer in his private capacity. Nor is it accurate, as the *Scherer* court said, 523 F.2d at 374, that the firearms "became a part of [Scherer's] business inventory the moment they were placed on the market for resale." Rather, as Circular 72-30 correctly recognizes, a firearm is no longer part of the business inventory once it has been disposed of to a private party and the disposition recorded. A firearm, moreover, does not revert to business inventory when the dealer, in his personal capacity, offers it for sale away from his premises. Once a dealer has transferred a firearm from his business to himself in his personal capacity, for the firearm again to become part of the inventory it

would have to be transferred and recorded as an acquisition on the dealer's records or be physically possessed on the business premises without being segregated and identified as a personal firearm.

Applying these principles to the instant case, it is evident that Petitioner was not required to make or maintain records of the five sales which form the basis of the charges against him. Since the firearms never became part of his dealer inventory, he was never under any legal obligation to record their sales in his dealer records. Of course, because the firearms sales were made in Maryland between Maryland residents, they were perfectly legal in all other respects.

3. The Fourth Circuit's holding in this case is directly in conflict with the Ninth Circuit's decision in *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982). In this case, the warrant commanded, tracking the language of 18 U.S.C. 924(d), that agents seize "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c)." Similarly, the warrant in *Cardwell* authorized the seizure of books and records "which are the fruits and instrumentalities of violations of 26 U.S.C. § 7201." In holding the warrant insufficiently particular, the Ninth Circuit observed that " 'limiting' the search to only records that are evidence of the violation of a certain statute is generally not enough." 680 F.2d at 78. The Ninth Circuit concluded, therefore, that "[i]f items that are illegal, fraudulent, or evidence of illegality are sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized." *Id.* In stark contrast, the Fourth Circuit, in upholding warrants virtually identical to that in *Cardwell*, concluded that the "description of the items set forth in the warrant fell within the 'margin of flexibility' necessary for meeting the injunctions of specificity under the Fourth Amendment." (App. A, *infra*, 8a) Thus, in

conflict with the Ninth Circuit, the Fourth Circuit has approved warrants wherein the language used to describe the items to be seized is merely a generic directive framed in the language of a particular statute.[14] In doing so, the Fourth Circuit has decided, in effect, that, contrary to the commands of the Fourth Amendment, the determination of what items are to be seized may be left to the "discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485 (1965), *quoting Marron v. United States*, 275 U.S. 192, 196 (1927).[15] Indeed, the warrant approved by the Fourth Circuit's decision effectively required the seizing agents to investigate to determine whether 18 U.S.C. 922(c) had been violated, and then to determine which items had been used in past violations and which were intended to be so used in the future. *Cardwell* specifically disapproved this type of "massive reexamination" after the Government had already conducted an investigation of its case. 680 F.2d at 78.

4. In interpreting the Due Process Clause of the Fifth Amendment, this Court has uniformly held that due process of law is violated when a citizen is convicted "for exercising a privilege which the state had clearly told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 426

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[14] This is not to say that all warrants which describe property in generic terms are invalid; rather, it is only those warrants which frame the generic description in terms of a statute which must fail since such warrants require the executing officer to make an on-the-scene legal determination of what items are to be seized.

[15] The warrant in this case also fails from a lack of probable cause if it is determined that Petitioner did not violate 18 U.S.C. 922(c), since McMonagle's affidavit in support of the issuance of the warrant was based entirely on facts supporting the theory that the sales by Petitioner to Schoen violated 18 U.S.C. 922(c). The affidavit was also inadequate to establish probable cause because it was factually incorrect in avering that Schoen told Petitioner, during their telephone conversation of December 6, 1977, that he would be in the market to buy more firearms "off paper," the statement that was the linchpin of the affidavit.

(1959). Likewise, in *Cox v. Louisiana*, 379 U.S. 559 (1965), where the defendant was convicted for engaging in activity which the police had previously told him would not be in violation of law, this Court held that the "Due Process Clause does not permit convictions to be obtained under such circumstances." 379 U.S. at 571. In reaching this conclusion, this Court has not suggested that a defendant must, in instances unrelated to the charges against him, have relied on the advice he received; indeed, because *Raley* and *Cox* were concerned with the question of fundamental fairness, those decisions compel the conclusion that the only relevant issue is whether or not the defendant relied upon the advice in the instances which are the subject of the charges against him. Yet, the Fourth Circuit concluded that because Petitioner did not rely on the Government's advice (that it was not necessary to record the sales of the type made to Schoen) with regard to "some sales" of personal firearms unrelated to this case, that he "did not in fact rely upon this purported counseling" when making the sales to Schoen. (App. A, *infra*, 6a)[16] Aside from the fact that Petitioner's testimony that he relied upon the advice he was given was uncontroverted—indeed, the fact that he received such advice was corroborated by Mr. Krogman's letter—such an interpretation of *Raley* and *Cox* limits those decisions to the degree that they are effectively nullified.

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[16] Indeed, as has already been explained, the advice received, unlike that received by the defendant in *Raley*, was correct. BATF, in *your 1977 guide to*—FIREARMS REGULATION, specifically advised that, at a gun show, an unlicensed resident of the state in which a gun show is held may make an occasional sale of a firearm to another nonlicensee residing in his state as long as he is not "engaging in the business." Petitioner, at the gun shows in Maryland was, of course, a nonlicensee. The *guide* also advised dealers that Form 4473 is required only for sales by a licensee.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

RICHARD BOULIN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
A. Opinion of the Court of Appeals	1a
B. Order of the Court of Appeals Denying Petition for Rehearing	11a
C. Memorandum and Order Denying Petition of Defendant for Writ of Error Coram Nobis (July 7, 1982)	13a
D. Judgment of the District Court	19a
E. Order amending Memorandum of August 1, 1979 (October 10, 1979)	22a
F. Memorandum of Judge Murray (August 1, 1979)	23a
G. Memorandum and Order Denying Motion to Suppress (July 31, 1978)	27a
H. Stipulation of Facts (September 13, 1978)	36a
I. Indictment	42a
J. Search Warrant and accompanying affidavit	49a
K. Letter to Senator Hayakawa from Acting Director Krogman	56a
L. Letter of Director of BATF regarding disposition of personal firearms (April 7, 1980)	62a
M. Form 4473 Part I	63a
N. Form 4473 Part II	65a
O. Partial transcripts of April 7, 1978, suppression hearing	67a
P. Partial transcript of June 9, 1977, suppression hearing	71a
Q. Transcript of December 6, 1977, telephone conversation	74a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5287(L)
No. 82-6443

UNITED STATES OF AMERICA,
Appellee,

v.

RICHARD BOULIN,
Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Herbert F. Murray, Judge

Argued: December 10, 1982 Decided: April 12, 1983

Before WINTER, Chief Judge, RUSSELL, Circuit Judge and BRYAN, Senior Circuit Judge.

David H. Martin (Richard E. Gardiner on brief) for Appellant; Lynne A. Battaglia, Assistant United States Attorney (J. Frederick A. Motz, United States Attorney on brief) for Appellee.

BRYAN, Senior Circuit Judge:

Richard Boulin attacks his conviction of violations of the Gun Control Act of 1968, (the Act), 18 U.S.C. §§ 921-928. A Federally licensed firearms dealer, he sold various weapons to an informant who reported to the Bureau of Alcohol, Tobacco, and Firearms (B.A.T.F.). Following searches of Boulin's business premises and home, a grand jury for the District Court of Maryland returned a thirteen-count indictment of him for unlawful sales and with failure to maintain records conforming to the Act.[1] Found guilty on ten counts, he appeals and we affirm.

I

A former police officer, Boulin received a Federal license on February 2, 1976 to trade in firearms. It confined sales to his business premises in Silver Spring, Maryland. While attending the J & S Wildcat Gun Show in Baltimore on September 25, 1977 he sold three guns to B.A.T.F. informant, Gordon Schoen. He recorded two of these sales in his personal weapons log, but failed to include the sale of a Luger pistol. He did not file transfer forms for any of these transactions.

Six days later, Boulin sold three more handguns to Schoen at a gun show in Greenbelt, Maryland. Entries in his weapons log were made for two of these weapons for which he also executed transfer papers. Nonetheless, he neither recorded nor reported the sale of a Colt .357 magnum revolver. Boulin returned to the same gun show on November 5, 1977. There he sold a Colt Python Revolver to Schoen, but again omitted to record or report it.

In a telephone conversation on December 6, 1977, Schoen and Boulin discussed the possibility of transacting further sales without submitting Federal forms.[2] Schoen then

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[1] The indictment charged Boulin with violations of 18 U.S.C. §§ 2, 922(c), 922(m), 923, 924(a); 27 C.F.R. §§ 178.124(a), 178.124(c), 178.126(a).

[2] A tape recording of the conversation revealed that Boulin agreed the sales would be "like we did them before."

passed this information on to B.A.T.F. Special Agent William McMonagle who drafted an affidavit which detailed the various purchases by Schoen. It also noted that at his home and place of business, Boulin had concealed weapons that had been used and were intended to be used in breach of the Federal firearms laws. A United States Magistrate issued two warrants authorizing the search of both places for "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. 922(m) and 922(c)." During the home search, B.A.T.F. agents seized numerous weapons, Boulin's weapons log, and his dealer's records.[3]

Of the thirteen indictment counts Boulin was convicted of ten violations of the Gun Control Act and regulations promulgated pursuant to it.[4] The District Court had denied the defendant's pre-trial motion to suppress the evidence, and upon a stipulation of facts, his convictions fol-

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[3] The B.A.T.F. agents seized 34 long guns, 49 handguns, and 5,765 rounds of ammunition. Also seized were Boulin's personal weapons log, Federal firearms license dealers records, and personal credit card records.

[4] The indictments embodied the sales of seven weapons on three different dates. (1) On September 24, 1977, Boulin sold the following weapons: A Luger semi-automatic pistol, for which no records were completed; a Colt .25 caliber semi-automatic pistol, which was recorded in the defendant's personal weapons log, but for which no Federal transfer papers were completed; a Browning .22 semi-automatic rifle, which only was recorded in Boulin's personal weapons log. (2) On October 1, 1977 Boulin sold the following weapons: a Colt .357 Magnum revolver, for which no records were completed; a High Standard .22 caliber semi-automatic pistol, for which all records were completed; a Smith & Wesson .357 Magnum revolver for which all records were completed. (3) On November 5, 1977, Boulin sold a Colt Python .357 Magnum revolver without completing any records.

lowed.[5] A post trial petition for a writ of error *coram nobis* also was denied.[6]

II

The Act established a comprehensive scheme for regulating the purchase and sale of firearms. 18 U.S.C. §§ 921-928. It put severe limitations upon an individual's free engagement in the busines of gun trading.[7] Among the strictures are those requiring the reporting of sales where the purchaser does not appear in person at a licensed dealer's place of business.[8] Failure to make a nec-

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[5] The Government entered a *nolle prosequi* as to the remaining three counts of the indictment.

[6] The defendant's petition for the writ centered on a letter from B.A.T.F. Acting Director Krogman to a United States Senator. *See* discussion of letter *infra*.

[7] In passing the Act, Congress declared that its purpose was to control weapons traffic in interstate and foreign commerce. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 226 *reprinted following* 18 U.S.C. § 921.

[8] 18 U.S.C. § 922(c). The section reads:

> (c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—
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> (1) the transferee submits to the transferor a sworn statement in the following form:
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> * * * *
>
> (2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or had had the statement returned due to the refusal of the

essary record amounts to an infraction of the law. *Id.* § 922(m).

Additionally, 18 U.S.C. § 923(g) dictates that records must be maintained that cover the disposition of all firearms by a dealer. It grants the Secretary of the Treasury authority to prescribe regulations governing the form of these records. Regulations issued under this section mandate the completion of a firearms transaction record, Form 4473, whenever a licensed dealer disposes of a firearm. 27 C.F.R. § 178.124(a), (f). A separate form must be executed when a dealer disposes of more than one pistol at the same time. *Id.* § 178.126(a).

Boulin assigns numerous errors. Initially, he insists that the record-keeping requirements do not obtain where sales are made from a dealer's private gun collection instead of his business inventory.[9] We reject this distinction. When Boulin offered the weapons for sale the Federal regulations applied and it was immaterial whether the guns came from his personal or business listing. *United States v. Courier*, 621 F.2d 7, 9 (1st Cir. 1980);

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named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

[9] In advancing this argument, Boulin relies upon guidelines published by the Department of the Treasury in Industry Circular 72-30. This circular, however, explicitly refers to firearms in a dealer's private collection as those not being for sale. The Court of Appeals for the Seventh Circuit reached the same conclusion in *United States v. Scherer*, 523 F.2d 371, 373 (7th Cir. 1975).

United States v. Scherer, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

Boulin next contends that he was improperly accused under 18 U.S.C. 922(c). To repeat, this section allows a licensed gun dealer to sell a weapon to a person who does not appear at his business premises if various reports are made. According to the agreed facts the defendant sold weapons away from his business location without obeying the additional requirements of 922(c). He therefore properly was indicted under this section.

Throughout his prosecution, Boulin claimed that in doing business with Schoen he had relied upon the opinion of an unidentified B.A.T.F. agent as to the extent of the recording requirements. He further postulates that a letter from the Acting Director of the B.A.T.F. to a United States Senator enunciates the same advice the B.A.T.F. agents related to him, and because of this, his prosecution was fundamentally unfair. Nonetheless, the District Court found, and we agree, that Boulin did not in fact rely upon this purported counseling. During the relevant period, Boulin did record some sales of "personal" firearms although he failed to record the sales made to Schoen on September 25, 1977, October 1, 1977, and November 5, 1977. As the District Court correctly noted, the doctrine of estoppel cannot be applied unless reliance is shown. *Bornstein v. United States*, 345 F.2d 558, 563 (Ct. Cl. 1965).

Also, the defendant avers that the Government broke the law of *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing the letter from the Acting Director to the Senator. Boulin stresses that had he been aware of the letter, he would not have waived his right to a jury trial because of the letter's potential use for impeachment purposes.[10] The communication, however, does not evince an

[10] Indeed, Boulin waived his right to a jury trial on September 13, 1978 while the letter was dated July 30, 1979.

invocation of the rule in *Brady*. First, it is only an interpretation of the law and not a fact material to issues of guilt or punishment. *Reddy v. Jones*, 572 F.2d 979, 982 (4th Cir. 1977); *see also Moore v. Illinois*, 408 U.S. 786, 794 (1971). Second, the reliability of the B.A.T.F. witnesses against whom the letter might have been used would not have been determinative of Boulin's guilt or innocence. *United States ex rel Marzeno v. Gengler*, 574 F.2d 730, 735 (3d Cir. 1978). Rather, the recorded conversations and stipulated facts were so determinative.

Boulin also attacks his conviction on the grounds that the warrant employed to search his home was unsupported by probable cause. An examination of the affidavit submitted by Agent McMonagle yields an opposite conclusion. The affidavit extensively detailed a series of weapons transactions between a named informant and the defendant in which the requisite forms were not completed. It also related a telephone conversation between the two men which raised the prospect of further sales without the furnishing of completed forms and that the subject matter of these sales was stored at Boulin's home. The District Court properly concluded that probable cause existed.

A further ground for reversal asserted by the defendant is that the search warrant lacked a particular description of the things to be seized. The purpose of the particularity demand of the Fourth Amendment is to assure that the police do not engage in a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The requirement renders general searches impossible by leaving nothing to the "discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485 (1965), *quoting Marron v. United States*, 275 U.S. 192, 196 (1927).

At the same time, this Court has recognized that where First Amendment considerations are not involved, "[t]he character of the items to be seized pursuant to a warrant

controls to a large extent the specificity required in describing them . . ." *United States v. Lowry*, 675 F.2d 593, 595 (4th Cir. 1982). Consequently, the requirement of particularity contains a "practical margin of flexibility." *Id.* at 595; *United States v. Jacob*, 657 F.2d 49, 52 (4th Cir. 1981), *cert. denied*. 102 S.Ct. 1435 (1982); *United States v. Espinoza*, 641 F.2d 153, 165 (4th Cir. 1981), *cert. denied* 454 U.S. 841 (1981); *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir. 1979), *cert. denied* 446 U.S. 957 (1980).

Here the items to be seized were limited to Boulin's cache of arms and the records pertaining to them. It was not imperative that each weapon or document be described individually. The description of the items set forth in the warrant fell within the "margin of flexibility" necessary for meeting the injunction of specificity under the Fourth Amendment.

For the reasons stated, we find no error in the judgment of the District Court and so we affirm.

AFFIRMED

WINTER, Chief Judge, dissenting:

If we are to decide this case now,[1] I would reverse all the judgments because of the invalidity of the warrant, which lacked particularity with respect to the items to be seized. In any event, irrespective of the admissibility of the evidence seized, I would reverse those convictions based upon violations of 18 U.S.C. § 922(c).

I therefore respectfully dissent.

I.

The search warrant in this case, the execution of which uncovered evidence used to convict defendant, properly described a particular place to be searched. It was quite nonspecific, however, in its authorization of the seizure of property allegedly concealed on the premises. Despite the Fourth Amendment's requirement that a warrant "particularly describ[e] . . . the . . . things to be seized", the warrant here merely referred to "firearms, ammunition and records involved in, used in, or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c) . . . ." The enforcing agents were thus effectively provided with a general warrant, authorizing wholesale seizure of items from defendant's combined home and business premises guided by only the agents' own on-the-spot legal interpretation of a federal criminal statute. There is evidence in the case that the agent supervising execution of the warrant was so uncertain of its scope that he telephoned his superior for clarification of what he could seize. And illustrative of the vice of the warrant even with such clarification was the seizure of commemorative guns mounted on plaques inside defendant's living quarters and wholly unrelated to the charges against him, and of his personal credit card account records over and above

[1] Decision here could well be stayed until the Supreme Court decides Illinois v. Gates, No. 81-430, reargued March 1, 1983, on the general issue of whether modification of the exclusionary rule might be warranted. Although the precise issue posed by *Gates* is not present here, it is not unlikely that what will be said when *Gates* is decided may have relevance to this case.

all his business records. The open-ended direction to seize items related to any "violation of Title 18 U.S.C. Section 922(m) and 922(c)" violated the Fourth Amendment guarantee that "nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927).

The warrant issued here is indistinguishable from that in United States v. Cardwell, 680 F.2d 75, 76-77 (9 Cir. 1982), which held that a direction to seize "corporate books and records, including . . . checks, check stubs, journals, [etc.,] of [certain named corporations,] which are the fruits and instrumentalities, of violations of 26 U.S.C. § 7201" was impermissibly general. On the authority of *Cardwell* and the cases it cites, I would make the same ruling here. Since, in my view, the seizure was in violation of the Fourth Amendment, I would suppress the evidence gathered thereby, and reverse defendant's convictions obtained on the basis of the tainted evidence.

II.

Defendant was convicted under five counts (counts 1-4 and 7) of the indictment charging a violation of 18 U.S.C. § 922(c).[2] That subsection prohibits a licensed dealer from selling a firearm to a purchaser who does not appear in person at the dealer's business premises unless certain conditions are satisfied. Significantly, the opening words of the subsection are "[i]n any case not otherwise prohibited by this chapter . . . ." Thus I view § 922(c) as making illegal only those acts or transactions which are not made illegal by other provisions of the firearms laws of Title 18 (§§ 921-928).

Each of the five § 922(c) counts relates to a given transaction which is also the subject of another count based on another firearms provision under which defendant was charged and convicted. Since § 922(c) by its terms could not render illegal that which was already illegal, these five convictions cannot stand.

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[2] The text is set forth in the majority opinion in n.8.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5287

UNITED STATES OF AMERICA,
Appellee,

versus

RICHARD BOULIN,
Appellant.

No. 82-6443

UNITED STATES OF AMERICA,
Appellee,

versus

RICHARD BOULIN,
Appellant.

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc has been submitted to the court. Upon the request for a poll of the court on the suggestion for rehearing in banc, all of the Judges voted against rehearing in banc except Chief Judge Winter, Judge Murnaghan, Judge Sprouse and Judge Ervin, who voted in favor of rehearing in banc.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Russell and Judge Bryan. Chief Judge Winter dissents.

For the Court

/s/ William K. Slate, II
Clerk

[Filed Jul. 15, 1983]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

MEMORANDUM

This matter arises on the petition of Richard Boulin for a writ of error coram nobis nullifying his 1979 conviction for failure to comply with the registration provisions of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*

Petitioner, formerly a federally licensed firearms dealer and so licensed on all dates pertinent to this case, was found guilty by the court on the basis of facts stipulated to by him and by the government. The stipulated facts before the court demonstrated that petitioner sold firearms to an undercover informant of the Bureau of Alcohol, Tobacco and Firearms (BATF) on three separate occasions while petitioner was away from his business premises. The stipulated facts showed further that petitioner knowingly failed to comply with the record-keeping provisions of 18 U.S.C. § 922, paragraphs (c) and (m).[1] Petitioner's chief defense was that the above-

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[1] 18 U.S.C. § 922(c) provides that "[a] licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manu-

cited sections of the United States Code were not intended to apply to firearms dealers when they were selling personal weapons. The court rejected this defense, adopting the reasoning of the Seventh Circuit Court of Appeals in *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. den.* 424 U.S. 911 (1976):

> . . . [I]t is immaterial whether the weapons sold were originally acquired for [defendant's] personal use or for business purposes. They became a part of his business inventory the moment they were placed on the market for resale. 523 F.2d at 374.

A writ of error coram nobis is only available under 28 U.S.C. § 1651(a) when errors of fact on the part of the trial court are of such a fundamental character that the proceeding itself is rendered irregular and invalid. *United States v. Morgan*, 346 U.S. 502 (1953). It is an extraordinary remedy which is applied only where the circumstances of the case are such that justice will not be achieved without its use. *Id.* at 511. Absent compelling circumstances, a writ of error coram nobis will not issue. *Deckard v. United States*, 381 F.2d 77 (8th Cir. 1967).

In support of his petition, petitioner renews his argument that his conviction should be voided because in deciding to sell guns to the undercover informant, he relied on the advice given him by BATF inspectors that if he sold personally owned firearms to Maryland residents he

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facturer, or dealer)" only if the dealer obtains a sworn statement of intent from the transferee or delays delivery of the firearms for at least seven days.

18 U.S.C. § 922(m) provides:

(m) It shall be unlawful for any . . . licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make any appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

need not comply with the recording requirements of the Gun Control Act and regulations promulgated thereto. The government's response to Mr. Boulin's petition demonstrates to the court's satisfaction that petitioner did not rely upon BATF advice since petitioner did record some sales of "personal" firearms between July and October 1977 while failing to record the three sales to the undercover informant made on September 25, 1977, October 1, 1977 and November 5, 1977 (Government's response to petition for writ of error coram nobis, March 31, 1980, pp. 5-10). Therefore, there is no factual basis for petitioner's estoppel argument, since without reliance there is no basis for application of the doctrine of estoppel. *Bornstein v. United States*, 345 F.2d 558, 563 (Ct. of Cl. 1965). Nor has petitioner cited any criminal cases in which the doctrine of estoppel has been applied to prevent the government from exercising its law enforcement function. Therefore, there also is no legal basis for petitioner's estoppel argument.

Next, petitioner brings to the court's attention a letter dated July 30, 1979 from John G. Krogman, Acting Director of the Bureau of Alcohol, Tobacco and Firearms, to Senator S. I. Hayakawa, in which Mr. Krogman states that a licensee's disposition of personal firearms need not be recorded in the licensee's business records[2] (Exhibit B, petition for writ of error coram nobis).

Petitioner argues that the Krogman letter presents compelling circumstances for the court to disregard case law and vacate petitioner's conviction.[3] The court be-

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[2] The present Director of BATF states that Mr. Krogman's conclusion about the disposition of "personal" firearms is incorrect (Apr. 7, 1980 letter of BATF director G. R. Dickerson to Assistant U.S. Attorney Lynne Battaglia, attached to April 11, 1980 letter from Ms. Battaglia to the court).

[3] Petitioner relies upon *Deckard v. United States*, 381 F.2d 77 (8th Cir. 1957) in which a writ of error coram nobis was granted to vacate a conviction after various courts of appeal had invalidated

lieves that it would have found petitioner guilty even if the court had been aware of the Krogman letter. In finding petitioner guilty under 18 U.S.C. § 922(m), the court adopted the reasoning in *United States v. Scherer, supra*, and found that a federally licensed firearms dealer must comply with the record-keeping requirements when selling firearms from his personal collection. Petitioner also was found guilty of a violation of 18 U.S.C. § 922(c) which provides that a "licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer or dealer)" only if the dealer obtains a sworn statement of intent from the transferee or delays delivery of the firearms for at least seven days. Certainly, the Krogman letter does not address the requirements of a statement of intent or delay when weapons are sold away from business premises and therefore the court's finding of petitioner's guilt under 18 U.S.C. § 922(c) would remain unchanged.

Petitioner also argues that the Krogman letter constitutes *Brady* material which should have been disclosed to him. Petitioner misconstrues the *Brady* rule. The *Brady* rule does not apply unless the evidence suppressed is evidence favorable to the defense and is material to the issues of guilt or punishment. *Moore v. Illinois*, 408 U.S. 786 (1972). Petitioner asserts that the letter falls within the *Brady* mandate because of its impeachment potential. The court disagrees. The reliability of the BATF witnesses against whom the letter might possibly have been used would not have been determinative of petitioner's guilt or innocence. "Evidence impeaching the testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a

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the federal statute under which the individual had been convicted. The factual distinction between *Deckard* and the instant case is obvious since a letter written by the Acting Director of an Agency is a far cry from a court ruling that a statute is unconstitutional.

criminal defendant's guilt or innocence." *United States ex rel Marzeno v. Gengler*, 574 F.2d 730, 735 (3rd Cir. 1978).

In short, the court finds petitioner has failed to demonstrate any fundamental errors which would warrant the granting of the extraordinary writ of error coram nobis. Therefore, the petition will be denied.

/s/ Herbert F. Murray
United States District Judge

Dated: July 7, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

ORDER

For the reasons stated in the accompanying memorandum, it is this 7th day of July 1982, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the petition of Richard Boulin for a writ of error coram nobis be, and the same hereby is, *Denied*; and

(2) that the Clerk of the Court mail a copy of this memorandum and order to each of the parties.

/s/ Herbert F. Murray
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Docket No. HM-77-0598

UNITED STATES OF AMERICA

vs.

RICHARD BOULIN
Defendant No. 1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date October 4, 1979.

COUNSEL

WITH COUNSEL David H. Martin, Esq. (Ret.)

FINDING & JUDGMENT

There being Court/verdict of GUILTY as to Counts Nos. 1, 2, 3, 4, 7, 8, 9, 10, 11 & 12.

Defendant has been convicted as charged of the offense(s) of (Counts Nos. 1 thru 4 inclusive, and 7) U.S.C., Title 18, Sections 922(c), 924(a) and 2—Unlawful sale of firearm; Aiding and Abetting. (Counts Nos. 8 thru 12 inclusive) U.S.C., Title 18, Sections 922(m), 923, 924(a) and 2; 27 CFR: 178.124(a) & (c)—Failure of federally licensed firearms dealer to maintain records; Aiding and Abetting.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year as to each of Counts Nos. 1, 2, 3, 4, 7, 8, 9, 10, 11 and 12 to run concurrently on condition that Defendant be confined in a jail-type or treatment institution for a period of Thirty (30) Days. The Court recommends that the committment period be in a Work Release Program of the Montgomery County Pre-Release Center.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ADJUDGED that the defendant pay a fine to the United States in the sum of Five Hundred ($500.00) Dollars. Balance of period of confinement is suspended and the Defendant is placed on probation for a period of Eleven (11) Months on the usual terms and conditions of probation and the further special condition: that Defendant pay the fine at such times and in such amounts as directed by the Probation Officer. Defendant to report to begin service of sentence at the Montgomery County Pre-Release Center, when directed.

NOLLE PROSEQUI ENTERED BY UNITED STATES ATTORNEY IN OPEN COURT AS TO EACH COUNTS NOS. 5, 6 AND 13, WHICH WAS ACCEPTED BY THE COURT.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general

conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Certified as a true copy on
This Date 10-11-79

By /s/ Ailene Kaplan
Deputy

/s/ Herbert F. Murray
HERBERT F. MURRAY

Date October 4, 1979

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

ORDER

It is hereby ORDERED AND ADJUDGED that the first paragraph of the memorandum issued in this case on August 1, 1979, be amended to read as follows:

> "This criminal firearms sale case comes before the court on facts stipulated to by the government and the defendant, Richard Boulin. The defendant is a former Montgomery County, Maryland police officer who is charged with selling firearms to an undercover informant of the Bureau of Alcohol, Tobacco and Firearms without complying with the registration provisions of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* Under the facts stipulated the court has no choice but to find Mr. Boulin guilty of the crimes charged in the indictment, except for Counts 5, 6 and 13 as to which the government will recommend dismissal. The court does this with great reluctance because the potential civil penalties in this case far outweigh the criminality of defendant's conduct."

/s/ Herbert L. Murray
United States District Judge

Dated: October 10, 1979

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

MEMORANDUM

This criminal firearms sale case comes before the court on facts stipulated to by the government and the defendant, Richard Boulin. The defendant is a former Montgomery County, Maryland police officer who is charged with selling firearms to undercover agents of the Bureau of Alcohol, Tobacco and Firearms without complying with the registration provisions of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* Under the facts stipulated the court has no choice but to find Mr. Boulin guilty of the crimes charged in the indictment. The court does this with great reluctance because the potential civil penalties in this case far outweigh the criminality of defendant's conduct.

FINDINGS OF FACT

The defendant is a federally licensed firearms dealer and was so licensed on all dates pertinent to this case. (Stip. 2) He maintained his licensed firearms business premises at 9112 Pennsylvania Avenue, Silver Spring, Maryland 20910. (Stip. 3) On September 25, 1977, October 1, 1977 and November 5, 1977, defendant sold firearms to Gordon William Schoen while away from those business premises. (Stips. 6-10) On those occasions Mr. Schoen did not hold a federal firearms license of any kind. (Stip. 5) In connection with the sales to Mr. Schoen, the defendant knowingly:

(a) did not obtain or receive a sworn statement from Gordon William Schoen, the purchaser of the firearms, in the form prescribed by Section 922(c) of Title 18 of the United States Code;

(b) did not, prior to delivery of the firearms, forward by registered or certified mail a copy of the sworn statement, together with a description of the firearm being sold, to the chief law enforcement officer of Mr. Schoen's place of residence;

(c) did not delay shipment or delivery of the firearms to Mr. Schoen for a period of at least seven days following receipt of notification of the acceptance or refusal of delivery of the statement; and

(d) did not retain, as part of his federal firearms records, a copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification.

(Stip. 12)

In connection with the same sales, the defendant knowingly failed to record the sales on firearms transaction records, or to obtain the same from Mr. Schoen, in accordance with the procedures set forth in 27 C.F.R. 178.124(a) and 178.124(f). (Stip. 13) Defendant's Federal Firearms Records do not include records of the sales to Mr. Schoen. (Stip. 14).

Mr. Boulin is charged with violating 18 U.S.C. § 922, paragraphs (c) and (m). 18 U.S.C. § 922(c) provides that "[a] licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer)" only if the dealer obtains a sworn statement of intent from the transferee or delays delivery of the firearms for at least seven days.

18 U.S.C. § 922(m) provides:

> (m) It shall be unlawful for any . . . licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

This section imposes criminal liability for failure to record the sales in accordance with 27 C.F.R. 178.124(a) and C.F.R. 178.124(f).

The activities of the defendant described in the stipulated facts conform in all essential details to activities expressly prohibited by these two sections of the United States Code. In *United States v. Huffman*, 518 F.2d 80, 81 (4th Cir. 1975), the Fourth Circuit Court of Appeals held that criminal intent is *not* an element of the crimes charged under the Gun Control Act. Under the stipulated facts, therefore, the government has made out a *prima facie* case against the defendant.

STATUTORY INTENT

The defendant contends that these sections of the United States Code were not intended to apply to firearms dealers when they were selling personal weapons not held as part of their business inventory. This is precisely the argument the court rejected earlier in this case when the court denied defendant's Motion to Suppress and Return Evidence and Personal Property. At that time this court adopted the reasoning of the Seventh Circuit Court of Appeals in *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. den.*, 424 U.S. 911 (1976). As that court stated,

> . . . [I]t is immaterial whether the weapons sold were originally acquired for [defendant's] personal use or for business purposes. They became a part of his business inventory the moment they were placed on the market for resale. 523 F.2d at 374

The statutes are strict liability statutes which make failures to report criminal offenses regardless of intent. While this result may seem harsh, it is the result of congressional efforts to "put teeth" into enforcement of gun control laws.

CIVIL IMPLICATIONS

Early in this opinion the court stated that it found Mr. Boulin guilty with great reluctance because of the civil forfeiture penalties that might accompany this conviction. If there were any way that this court could enjoin imposition of those penalties it would do so for the court believes that the necessary deterrence can be achieved through the criminal penalties available. Furthermore, the court has found Mr. Boulin to be an uncommonly cooperative defendant whose involvement in this case has been an isolated act of wrongdoing in an otherwise lawful and productive career.

Although the forfeiture issue has not been formally raised the court wishes to emphasizes its belief that justice would not be served by confiscation of Mr. Boulin's firearms without compensation. The court is informed that much of Mr. Boulin's personal savings are invested in this collection. The court suggests that perhaps the Departments of Justice and the Treasury and Mr. Boulin could arrange to sell the weapons in a closely regulated manner and that the proceeds from the sale be returned to Mr. Boulin. As previously noted, there are ample deterrents to future criminal conduct without depriving Mr. Boulin of his life's savings.

The court will sign an appropriate judgment order submitted by the government.

/s/ Herbert L. Murray
United States District Judge

Dated: August 1, 1979

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

MEMORANDUM AND ORDER

On December 20, 1977 the Grand Jury for the District of Maryland returned a thirteen count indictment charging defendant Richard Boulin, a licensed firearms dealer, with illegal sales of weapons to non-licensed persons, and a failure to maintain proper documentation as to such sales, in violation of the Gun Control Act, 18 U.S.C. 921, *et seq.* Five of the weapons described in counts of the indictment were from what defendant describes as his own personal gun collection. The sales, the government alleges, were made to a cooperating non-licensed individual named Gordon William Schoen at various gun shows at Baltimore and Greenbelt, Maryland where Boulin held himself out as a federally licensed dealer dealing as Commemoratives Unlimited, 9112 Pennsylvania Avenue, Silver Spring, Maryland.

On December 14, 1977, Special Agents of the Bureau of Alcohol, Tobacco and Firearms executed search warrants at the 9112 Pennsylvania Avenue address (defendant's licensed firearms' premises) and 8700 Hawkins Creamery Road, Gaithersburg, Maryland, the defendant's residence. Nothing was seized from the business prem-

ises. However, at defendant's residence the agents seized 83 firearms, 5,765 rounds of ammunitions, and various firearms records, including defendant's Dealer's Firearms Record Book, Dealer's Ammunition Record Book, and Personal Weapons Transactions Log.

On January 13, 1978, defendant moved under Rule 41(e) of the Federal Rules of Criminal Procedure for the return of all property seized at his residence and for suppression under Rule 12 of the use of such property as evidence in the trial of the charges in the indictment.

On February 13, 1978 at the joint request of the parties, the trial date was continued, and the court proceeded to hold an evidentiary hearing on April 7, 1978 on the Motion for Return of Property and to Suppress. The hearing was not concluded on that date but was continued on June 9, 1978 and again on June 19, 1978. The parties have submitted memoranda and the matter is ripe for determination.

The Basis for the Rule 41(e) Motion

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

The application for the search warrant which issued for the search of defendant's residence premises set forth that there was concealed therein certain property, namely, "firearms, ammunition and records which are the fruits, instrumentalities and evidence of violation of Title 18 U.S.C. Section 922(m) and 922(c)." The cited statu-

tory provisions impose on a federally licensed firearms dealer certain record-keeping requirements when selling firearms. Defendant maintains that he was in lawful possession of the firearms which were seized, since there is no evidence that he obtained the items in his "personal collection" illegally. He further contends that the seizure was illegal because there is no requirement under the law that a federally licensed firearms dealer comply with the record-keeping requirements of federal law when selling firearms from his *personal* collection. Additionally, it is argued by defendant that even if defendant was required to keep the records described in the statute at the time he sold guns from his private collection, the government cannot seize *other* unsold firearms from that collection, absent a showing of an intention on defendant's part to sell such weapons without complying with the record-keeping requirements. Finally, defendant contends the search warrant is technically deficient for failure to describe with sufficient particularity the items to be seized.

A. *The Application of the Gun Control Act to Sales by Firearms Dealers of Guns from a Personal Collection*

Because the record-keeping provisions of sections 922 (c), 922(m) and 923(g) do not specify whether they pertain to sales of firearms in a personal collection by a licensed dealer, defendant contends that it is appropriate to examine the legislative history of the Gun Control Act and that an examination will indicate that Congress did not intend the Act to pertain to such transactions. Defendant relies primarily on the preamble of the Gun Control Act which states that the Act is not intended to "discourage or eliminate the private ownership or use of firearms." Defendant argues that application of the record-keeping restrictions of the Act to sales of personal collections would constitute an unnecessary burden in contradiction to the purpose of the Act contained in the preamble.

The preamble does not address itself to the need to avoid restrictions on the sale or disposition of firearms, but only to avoidance of restrictions on ownership and possession of firearms. Accordingly, the preamble does not aid the court in determining the scope of the record-keeping provisions which apply to sales of firearms.

Defendant also argues that the application of the record-keeping provisions to sales by licensed dealers of personal firearms would violate the congressional intent not to adversely affect a person's desire to enter the business of dealing in firearms. Defendant reasons that application of these restrictions to a dealer selling personally held weapons would make it undesirable to become a dealer because persons selling guns without a license would not have to maintain such records. Defendant does not offer any support for his assumption that an unlicensed person could engage in sales of personally held firearms without complying with the restrictions of the Gun Control Act (Defendant's Memorandum at 6, n.3.), and the court does not agree with defendant's assumption. It is unlawful for a person to engage in the business of dealing in firearms without a license. 18 U.S.C. § 922 (a)(1). Although the statute does not define the term "engaged in the business", courts have construed the term to apply to one whose time, attention, and labor is occupied by such activity for the purpose of profit. *See, e.g., United States v. Huffman*, 518 F.2d 80 (4th Cir. 1975); *United States v. Day*, 476 F.2d 562 (6th Cir. 1973), *cited with approval* in *United States v. Lovingood*, 73-2071 (4th Cir. March 14, 1974) (per curiam).

To be engaged in the business of selling firearms, a person need not have that activity as his primary one. *See United States v. 57 Miscellaneous Firearms*, 422 F. Supp. 1066 (W.D. Mo. 1976). In fact, very little activity is required for a person to be considered a dealer, and thus subject to the license requirement of the Gun Control Act. In *Lovingood*, the Fourth Circuit of Appeals held

that two sales over a period of one month involving a total of five guns is sufficient activity to characterize the seller as a dealer.

Accordingly, persons who sell guns with sufficient frequency to be characterized as dealers do not have the option which defendant assumes exists to operate with or without a license. The statute requires that they be licensed and adhere to the restrictions established for the operation of a dealership. Therefore, the application of the record-keeping provisions to sales of weapons from a personal collection does not in any way discourage persons from becoming licensed dealers.

Defendant also argues that the record-keeping provisions of the Gun Control Act are ambiguous, and therefore, they must be construed leniently in defendant's favor. Although a concern for individuals rights results in a rule of narrow construction of ambiguous statutes, the Supreme Court in *Huddleston v. United States*, 415 U.S. 814 (1974), in construing another section of the Gun Control Act, explained that penal laws should not be construed to defeat the obvious intention of the legislature. 415 U.S. at 831.

A review of the statute establishes that the legislature intended the record-keeping provisions to apply to sales of weapons from a dealer's personal collection. First, the regulations promulgated pursuant to sections 922 and 923(g) refer to the sale of "any firearm". Also, to achieve the purpose of the Gun Control Act, the record-keeping provisions must be applied to sales from personal collections. In *Barrett v. United States*, 423 U.S. 212 (1976), the Court explained that the act was designed to prevent firearms from coming into the hands of the unqualified. If licensed dealers could avoid maintaining records by simply designating guns as belonging to a personal collection rather than a business inventory or by selling the guns from their residences rather than their

place of business, the effectiveness of recording gun sales to monitor who receives the firearms would be destroyed.

In *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), the Seventh Circuit addressed the same question before the court today: whether sales by licensed dealers of guns from a personal collection are regulated by the Gun Control Act. In applying the Act to such sales, the court explained that distinctions between business and personal transactions are unworkable and arbitrary. Once a gun is offered for sale by a dealer, it becomes part of his business inventory. In finding against the defendant, the court said:

> The necessary implication of these guidelines indicates that the act of selling a firearm, not its location or the arbitrary distinction between 'personal' and 'business' transactions, brings a weapon and the parties involved within the purview of federal control. In this regard the terms of 18 U.S.C. Section 923(g)[5] and the executing provisions of 26 C.F.R. Sections 178.124, 178.125 are clear. The statutes and regulations are comprehensive in their coverage, and refer to 'any firearm' and 'each disposition'. They were designed to keep a constant record of the transfer and location of firearms in order to reduce the indiscriminate flow of such weapons and the crime that inevitably follows in their wake. (footnote omitted). A licensed dealer must, therefore, comply with the record provisions of 26 C.F.R. Sections 178.124 and 178.125 each time he disposes of a firearm. In the instant case it is immaterial whether the weapons sold were originally acquired for Scherer's personal use or for business purposes. *They become a part of his business inventory the moment they were placed on the market for resale.* (Emphasis added) 523 F.2d at 374.

This court adopts the reasoning of the Seventh Circuit in *Scherer* and finds that a federally licensed firearms

dealer must comply with the record-keeping requirements of 18 U.S.C. Section 922(c) and (m) when selling firearms from his personal collection.

B. *Intent to Sell the Seized Firearms*

Defendant also argues that even if the court interprets the statute to require records to be kept on sales of guns from a dealer's personal collection, the government failed to show that defendant intended to sell the seized guns. Defendant argues that the mere fact that he sold five guns from his personal collection is insufficient to establish that he intended to sell any other guns illegally, particularly in light of the fact that the guns are not fungible. *See United States v. 2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958).

The question of intent is a factual one, and a dealer's entire stock is subject to forfeiture if the facts so warrant. *See United States v. 1,922 Assorted Firearms*, 330 F.Supp. 635 (E.D. Mo. 1971). For example, in *United States v. One Assortment of 12 Rifles & 21 Handguns*, 313 F.Supp. 641 (N.D. Fla. 1970), the court held that all guns displayed for sale were properly seized where defendant was operating as a dealer without a license.

In the present case, probable cause does not hinge merely on the fact that defendant previously had sold guns from his personal collection. The affidavit presented to the magistrate stated that defendant told Mr. Schoen, who was cooperating with the government agents, that he was willing to sell "numerous" guns which were at his residence without recording the sale. In this conversation, which took place on December 6, 1977, Schoen told Boulin that on December 14, 1977, he (Schoen) would be in the market to buy more firearms "off paper." According to Schoen, Boulin in agreeing to sell numerous firearms indicated he would sell them the same way he did before (referring to selling them without paperwork). Boulin said that the guns were being stored at his resi-

dence and would be there on December 14, 1977 when Schoen came there to buy them.

At the various hearings held on defendant's motion, the court heard tapes of monitored conversations between the defendant Boulin and Schoen which dealt with transactions for the sale of certain of the weapons from defendant's personal collection. A review of the facts and circumstances of these actual transactions circumstantially supports the inference that defendant intended to offer the weapons at his house for sale whenever the price was right. Also, the facts alleged in the affidavit of Agent William J. McMonagle in support of the application for a search warrant establish probable cause that the firearms seized at the Boulin residence were "involved or intended to be used" in violation of the Gun Control Act. *United States v. One Assortment of 12 Rifles & 21 Handguns*, 313 F.Supp. 641, 642 (N.D. Fla. Gainesville Div., 1970); *United States v. Ventresca*, 380 U.S. 102 (1965).

With regard to the claim that the items to be seized were not described in the warrant with sufficient particularity, the court finds pertinent here the language of the Seventh Circuit in *United States v. Scherer, supra*, dealing with a similar defense contention in that case:

> We have no such abuse of the warrant here. The items seized were limited to a cache of weapons and Scherer's Firearms Acquisition Record book—the document containing 'business records relating to the purchase and sale of firearms.' The defendant's argument that the agents could have inspected the volumes on the business premises as permitted by law, ignores the realities of the situation. Scherer had failed to record numerous weapons in his book. An affirmation of this belief depended upon a cross-check of the weapons with the volume entries. Since the firearms were not located in the defendant's office, seizure of

both the guns and records was the only feasible method of investigation.

The government was not required, as defendant contends, to unmistakably identify each weapon to be seized.

For the reasons herein stated, it is this 31st day of July, 1978,

ORDERED:

(1) that defendant's Motion to Suppress and Return Evidence and Personal Property be, and the same hereby is, *Denied*; and

(2) that the Clerk of the Court is directed to mail copies of this Memorandum and Order to George Beall, Esquire, counsel for defendant, and to Assistant United States Attorney Marsha A. Ostrer.

/s/ Herbert F. Murray
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

STIPULATION OF FACTS

It is hereby stipulated by and between the United States of America, by its undersigned counsel, and the Defendant, Richard Boulin and his undersigned counsel, that the following facts are true and correct, and that the facts contained herein shall be adopted by the parties and the finder of fact as if proved at trial:

1. At all times pertinent to this case, the Defendant resided at 8700 Hawkins Creamery Road, Gaithersburg, Maryland.

2. The Defendant has been a federally licensed firearms dealer since February 2, 1976, was a federally licensed firearms dealer on September 25, 1977, October 1, 1977 and November 5, 1977, and has held no other type of federal firearms license at any time. The Defendant's federal firearms license, a certified and exemplified copy of which is attached hereto as Exhibit 1 (and admitted in evidence herewith by agreement of the parties), authorized the Defendant to conduct business at 9112 Pennsylvania Avenue, Silver Spring, Maryland.

3. At all times pertinent to this case, the Defendant maintained his licensed firearms business premises at 9112 Pennsylvania Avenue, Silver Spring, Maryland 20910, as indicated on the business card of the Defendant which is attached hereto as Exhibit 2, and which is admitted in evidence herewith by agreement of the parties. A copy of such business card was presented to Gordon William Schoen on September 25, 1977. The Defendant's licensed firearms business was known as Commemoratives Unlimited and was individually owned at all times pertinent to this case.

4. At all times pertinent to this case, Gordon William Schoen resided at 2113 Sykesville Road, Westminster, Maryland.

5. At all times pertinent to this case, including on September 25, 1977, October 1, 1977 and November 5, 1977, Gordon William Schoen did not hold a federal firearms license of any kind.

6. On September 25, 1977, the Defendant set up a table at the J & S Wildcat Gun Show at the Baltimore Civic Center, Baltimore, Maryland, and displayed various firearms for sale. At such gun show, the Defendant sold and transferred to Gordon William Schoen three firearms, which were owned by the Defendant and were not recorded in his Dealer's Firearms Record Book, which was admitted into evidence at the suppression hearing in this case as Government's Exhibit 7. Mr. Schoen thereafter delivered the three firearms to Special Agent William J. McMonagle of the Bureau of Alcohol, Tobacco and Firearms. The three firearms which the Defendant sold to Mr. Schoen were as follows:

(a) One 9 mm Luger semi-automatic pistol, serial number on barrel 7318, on frame 4907, for $225.00 in cash, such pistol being admitted in evidence herewith as Exhibit 3, by agreement of the parties.

(b) One Colt .25 caliber semi-automatic pistol, serial number 15797, for $125.00 in cash, such pistol being admitted in evidence herewith as Exhibit 4, by agreement of the parties.

(c) One Browning .22 caliber semi-automatic rifle, serial number 34583T47, for $125.00 in cash, such rifle being admitted in evidence herewith as Exhibit 5, by agreement of the parties.

7. On October 1, 1977, the Defendant set up a table at the Greenbelt Gun Show at the Greenbelt National Guard Armory in Greenbelt, Maryland, and displayed various firearms for sale. At such gun show, the Defendant sold and transferred a Colt .357 magnum caliber revolver, serial number 36700SA to Gordon William Schoen, which was owned by the Defendant and was not recorded in his Dealer's Firearms Record Book, which was admitted into evidence at the suppression hearing in this case as Government's Exhibit 7, for $275.000 in cash, such revolver being admitted in evidence herewith as Exhibit 6, by agreement of the parties. Mr. Schoen thereafter delivered such firearm to Special Agent William J. McMonagle of the Bureau of Alcohol, Tobacco and Firearms.

8. On November 5, 1977, the Defendant set up a table at the Greenbelt Gun Show at the Greenbelt National Guard Armory, in Greenbelt, Maryland, and displayed various firearms for sale. At such gun show, the Defendant sold and transferred a Colt Python .357 magnum revolver, serial number 48051E, which was owned by the Defendant and was not recorded in his Dealer's Firearms Record Book, which was admitted into evidence at the suppression hearing in this case as Government's Exhibit 7, to Gordon William Schoen for $350.00 in cash, such revolver being admitted in evidence herewith as Exhibit 7, by agreement of the parties. Mr. Schoen thereafter delivered such firearm to Special Agent William J. McMonagle of the Bureau of Alcohol, Tobacco and Firearms.

9. Each of the firearms listed in paragraphs 6, 7 and 8 above is a "firearm" within the definition of Section 921(a) of Title 18 of the United States Code.

10. Neither the J & S Wildcat Gun Show on September 25, 1977, the Greenbelt Gun Show on October 1, 1977 nor the Greenbelt Gun Show on November 5, 1977 constituted a licensed business premise of the Defendant within the meaning of Section 922(c) of Title 18 of the United States Code.

11. At no time has Gordon William Schoen ever been requested to appear or appeared at the licensed business premise of the Defendant.

12. In connection with the sale of each of the five firearms specified in paragraphs 6, 7 and 8 above, the Defendant knowingly:

(a) did not obtain or receive a sworn statement from Gordon William Schoen, the purchaser of the firearms, in the form prescribed by Section 922(c) of Title 18 of the United States Code;

(b) did not, prior to delivery of the firearms, forward by registered or certified mail a copy of the sworn statement, together with a description of the firearm being sold, to the chief law enforcement officer of Mr. Schoen's place of residence;

(c) did not delay shipment or delivery of the firearms to Mr. Schoen for a period of at least seven days following receipt of notification of the acceptance or refusal of delivery of the statement; and

(d) did not retain, as part of his federal firearms records, a copy of the sworn statement and a copy of the notification to the local law

enforcement officer, together with evidence of receipt or rejection of that notification.

13. In connection with the sale of each of the five firearms specified in paragraphs 6, 7 and 8 above, the Defendant knowingly failed to record the sale of each such firearm to Mr. Schoen on a firearms transaction record, Form 4473 and to obtain a Form 4473 from Mr. Schoen with respect thereto, in accordance with the procedures set forth in 27 C.F.R. 178.124(a) and 178.124(f).

14. The Federal Firearms Records of the Defendant do not contain or reflect any Forms 4473 taken from Gordon William Schoen in connection with the sale to Mr. Schoen of each of the five firearms specified in paragraphs 6, 7 and 8 above.

15. All of the events described in the preceding paragraphs occurred in the State and District of Maryland.

16. In addition to the facts stipulated in the preceding paragraphs, the parties further stipulate that all contents of the court's file and all matters of record heretofore in this proceeding, including all testimony recorded in connection with the Defendant's Motion to Suppress and Return Evidence and Personal Property, all exhibits introduced into the record in connection with such testimony or otherwise (including transcripts of certain tape recordings made by the Government), and all stipulations of fact or other matters of record, shall be incorporated herein by reference and made a part hereof.

Date: 9-13-78 /s/ Russell T. Baker, Jr.
RUSSELL T. BAKER, JR.
United States Attorney

Date: 9-13-78 /s/ Lynne A. Battaglia
LYNNE A. BATTAGLIA
Assistant United States Attorney

Date: 9-13-78 /s/ John A. MacColl
JOHN A. MACCOLL
Assistant United States Attorney

Date: 9-13-78 /s/ David Martin
DAVID MARTIN
Counsel for the Defendant

Date: 9-13-78 /s/ William P. Crewe
WILLIAM P. CREWE
Counsel for the Defendant

Date: 9-13-78 /s/ Richard Boulin
RICHARD BOULIN
Defendant

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Criminal No. 77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

(Unlawful Sale of a Firearm, 18 USC §§ 922(c) and (a); Failure by Federally Licensed Firearms Dealer to Maintain Records, 18 USC §§§ 922(m), 923, 924(a), 27 CFR § 178.124 and (c), 18 USC § 2)

The Grand Jury for the District of Maryland charges:

On or about the 25th day of September, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one 9mm Luger semi automatic pistol, serial number on barrel 7318, on frame 4907, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

On or about the 25th day of September, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one Colt .25 caliber semi automatic pistol, serial number 15797, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

On or about the 25th day of September, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one Browning .22 caliber semi automatic rifle, serial number 34583T47, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT FOUR

And the Grand Jury for the District of Maryland further charges:

On or about the 1st day of October, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one Colt .357 magnum caliber revolver, serial number 36700SA, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT FIVE

And the Grand Jury for the District of Maryland further charges:

On or about the 1st day of October, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one Smith and Wesson .357 magnum caliber revolver, serial number N381089, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT SIX

And the Grand Jury for the District of Maryland further charges:

On or about the 1st day of October, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States

Code, Section 922(c) in connection with the sale of a firearm, that is, one High Standard model 101, .22 caliber semi automatic pistol, serial number 2079436, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT SEVEN

And the Grand Jury for the District of Maryland further charges:

On or about the 5th day of November, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a licensed dealer of firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one Colt Python .357 magnum revolver, serial number 48051E, to a person (who was not a licensed importer, manufacturer, or a dealer of firearms) who did not appear in person at his licensed business premises.

18 USC §§ 922(c) and 924(a), 18 USC § 2.

COUNT EIGHT

And the Grand Jury for the District of Maryland further charges:

On or about the 25th day of September, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 U.S.C. § 923 and 27

CFR § 178.124(a) in that he sold and disposed of one 9mm Luger semi-automatic pistol, serial number on barrel 7318, on frame 4907, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.

18 USC § 922(m), 18 USC § 923, 18 USC § 924(a), 27 CFR § 178.124(a) and (c), 18 USC § 2.

COUNT NINE

And the Grand Jury for the District of Maryland further charges:

On or about the 25th day of September, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 USC § 923 and 27 CFR § 178.124(a) in that he sold and disposed of one Colt .25 caliber semi-automatic pistol, serial number 15797, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.

18 USC § 922(m), 18 USC § 923, 18 USC § 924(a), 27 CFR § 178.124(a) and (c), 18 USC § 2.

COUNT TEN

And the Grand Jury for the District of Maryland further charges:

On or about the 25th day of September, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 USC § 923 and 27

CFR § 178.124(a) in that he sold and disposed of one Browning .22 caliber semi automatic rifle, serial number 34583T47, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.

18 USC § 922(m), 18 USC § 923, 18 USC § 924(a), 27 CFR § 178.124(a) and (c), 18 USC § 2.

COUNT ELEVEN

And the Grand Jury for the District of Maryland further charges:

On or about the 1st day of October, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 USC § 923 and 27 CFR § 178.124(a) in that he sold and disposed of one Colt .357 magnum caliber revolver, serial number 36700SA, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.

18 USC § 922(m), 18 USC § 923, 18 USC § 924(a), 27 CFR § 178.124(a) and (c), 18 USC § 2.

COUNT TWELVE

And the Grand Jury for the District of Maryland further charges:

On or about the 5th day of November, 1977, in the State and District of Maryland,

RICHARD BOULIN

being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 USC § 923 and 27 CFR § 178.124(a) in that he sold and disposed of one

Colt Python .357 magnum revolver, serial number 48051E, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.

18 USC § 922(m), 18 USC § 923, 18 USC § 924(a), 27 CFR § 178.124(a) and (c), 18 USC § 2.

COUNT THIRTEEN

And the Grand Jury for the District of Maryland further charges:

On or about the 25th day of September 1977, in the State and District of Maryland,

RICHARD BOULIN

being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 USC § 923 and 27 CFR § 178.126(a) in that he sold or disposed of one 9mm Luger semi-automatic pistol, serial number, on barrel, 7318, on frame 4907, and one Colt, .25 caliber semi-automatic pistol, serial number 15797, to Gordon William Schoen, a nonlicensee, without recording the said transaction on a Report of Multiple Sale or Other Disposition of Pistols and Revolvers, Form 3310.4 and did fail to forward to the office specified thereon later than the close of business on the day that the multiple sale or disposition occurred.

18 USC § 922(m), 18 USC § 923, 18 USC § 924(a), 27 CFR § 178.126(a), 18 USC § 2.

JERVIS S. FINNEY
United States Attorney

A True Bill:

Foreman

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Docket No. 8-77

Case No. 5975N

UNITED STATES OF AMERICA

vs.

8700 HAWKINS CREAMERY ROAD,
GAITHERSBURG, MARYLAND

SEARCH WARRANT

To Special Agent William J. McMonagle, Bureau of Alcohol, Tobacco & Firearms, or any other authorized officer

Affidavit(s) having been made before me by Special Agent William J. McMonagle that he has reason to believe that on the premises known as 8700 Hawkins Creamery Road, Gaithersburg, Maryland, being described as a one story brick home with the numbers 8700 appearing over the door located at the intersection of Woodfield Road and Woodfield School Road in the Judicial District of Maryland there is now being concealed certain property, namely firearms, ammunition and records involved in, used in or intended to be used in violation of Title 13 USC Section 922(m) and 922(c) and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search on December 14, 1977 (not to exceed 10 days) the person or place named

for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.*) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before me as required by law.

Federal judge or magistrate

Dated this 12 day of December, 1977

/s/ [Illegible]
Judge (Federal or State Court of Record) or Federal Magistrate.

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* The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provisions in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)) A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

RETURN

I received the attached search warrant December 12, 1977, and have executed it as follows:

On December 14, 1977 at 11:30 o'clock AM, I searched the person or premises described in the warrant and

I left a copy of the warrant with Mrs. Susan Boulin together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

SEE ATTACHED SHEETS

This inventory was made in the presence of Special Agent Eugene Reagan and Willie Ellison

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Special Agent [Illegible]

Subscribed and sworn to and returned before me this ———— day of ——, 19—.

Federal Magistrate

AFFIDAVIT

I, William J. McMonagle, being duly sworn upon my oath, depose and state:

That I have been employed as a Special Agent with the Bureau of Alcohol, Tobacco and Firearms, U.S. Treasury Department, for approximately six and one-half (6½) years. During the course of that time I have had occasion to participate in, as well as, obtain and execute numerous arrest and search warrants regarding violations of the federal firearms and explosive laws.

Your affiant has known Gordon William Schoen for approximately four (4) months. During this time Mr. Schoen has provided your affiant with information in reference to unlawful and lawful firearms activities on a basis of at least five (5) times a week. A substantial portion of the aforementioned information provided to your affiant by Mr. Schoen has been independently corroborated by your affiant and other ATF Special Agents, and has been found to be true and correct in each instance.

On September 25, 1977, Gordon William Schoen, acting in cooperation with and under the guidance and control of your affiant, went to the J & G Wildcat Gun Show, Baltimore, Maryland. Mr. Schoen stated to your affiant that while there, he purchased the following firearms from Richard Boulin, a federally licensed firearms dealer, trading as Commemoratives Unlimited:

1. One 9mm Luger semi automatic pistol, serial number on barrel 7318, on frame 4907, for two hundred twenty-five dollars ($225.00)
2. One Colt .25 caliber semi automatic pistol, serial number 15797, for one hundred twenty-five dollars ($125.00)
3. One Browning .22 caliber semi automatic rifle, serial number 34583T47 for one hundred twenty-five dollars ($125.00)

With the knowledge and consent of Gordon William Schoen, the aforementioned transaction was monitored and recorded by your affiant by means of an electronic device placed on the person of Mr. Schoen. However, due to technical difficulties portions of the aforementioned transaction were inaudible.

Mr. Schoen further stated to your affiant that while at the aforementioned gun show, Boulin stated to him that he (Boulin) was a federally licensed firearms dealer and presented Mr. Schoen with one of his (Boulin's) business cards verifying the fact that he (Boulin) was in fact a federally licensed firearms dealer trading as Commemoratives Unlimited, 9112 Pennsylvania Avenue, Silver Spring, Maryland.

On October 1, 1977, Gordon William Schoen, acting in cooperation with and under the guidance and control of your affiant, went to the Greenbelt Gun Show, Greenbelt National Guard Armory, Greenbelt, Maryland. Mr. Schoen stated to your affiant that while there, he purchased the following firearms from Richard Boulin:

1. One Colt .357 magnum caliber revolver, serial number 36700SA for two hundred seventy-five dollars ($275.00)
2. One Smith and Wesson magnum caliber revolver, serial number NE81039, for two hundred seventy-five dollars ($275.00)
3. One High Standard model 101, .22 caliber semi automatic pistol, serial number 2079436, for one hundred dollars ($100.00)

With the knowledge and consent of Gordon William Schoen, your affiant monitored the aforementioned transaction by means of an electronic device placed on the person of Mr. Schoen. However, due to technical difficulties, portions of the aforementioned transaction were inaudible.

On November 5, 1977, Gordon William Schoen, acting in cooperation with and under this guidance and control

of your affiant, went to the Greenbelt Gun Show, Greenbelt National Guard Armory, Greenbelt, Maryland. Mr. Schoen stated to your affiant that while there, he purchased one Colt Python .357 magnum revolver, serial number 48051E for three hundred fifty dollars ($350.00) from Richard Boulin. With the knowledge and consent of Gordon William Schoen, the aforementioned transaction was monitored and recorded by your affiant by means of an electronic device placed on the person of Mr. Schoen. However, due to technical difficulties, portions of the aforementioned transactions were inaudible.

On or about November 14, 1977, your affiant received certification from the Regional Regulatory Administrator, Bureau of Alcohol, Tobacco and Firearms, Mid-Atlantic Region, Philadelphia, Pennsylvania, stating that Richard Boulin who resides at 8700 Hawkins Creamery Road, Gaithersburg, Maryland, and whose federal firearms business is located at 9112 Pennsylvania Avenue, Silver Spring, Maryland, filed an application for a federal firearms license on November 20, 1975. He was issued a federal firearms license, number 52-7146, on February 2, 1976, and timely filed his renewal application. His current license will expire on March 1, 1978.

On or about December 6, 1977, Gordon William Schoen stated to your affiant that during some but not all of the aforementioned firearms transactions, he completed some federal firearms forms. However, Mr. Schoen was not sure of just how many forms he completed.

On December 7, 1977, Gordon William Schoen stated to your affiant that on December 6, 1977, he telephoned Richard Boulin at 253-6133 and told him that on Wednesday, December 14, 1977, he (Schoen) would be in the market to buy more firearms "off paper." According to Mr. Schoen, Mr. Boulin said that he would sell Mr. Schoen numerous firearms the same way he did before (referring to selling them without paperwork). Boulin said that the guns are presently being stored at his resi-

dence, 8700 Hawkins Creamery Road, Gaithersburg, Maryland, and that they would be there on Wednesday, December 14, 1977, when Schoen went there to buy them. Mr. Boulin then proceeded to give Mr. Schoen directions to his (Boulin's) residence at 8700 Hawkins Creamery Road, Gaithersburg, Maryland.

Based on the information set forth in this affidavit your affiant has reason to believe that presently being concealed on the federally licensed firearms premises of Richard Boulin, 9112 Pennsylvania Avenue, Silver Spring, Maryland, and at his residence, 8700 Hawkins Creamery Road, Gaithersburg, Maryland, are firearms, ammunition and records involved in, used in and intended to be used in violation of Title 18 USC Section 922(m), and 922(c).**

WILLIAM J. MCMONAGLE
Special Agent

Subscribed and sworn to before me this — day of December 197—

United States Magistrate

** Subsequent to each controlled purchase of firearms Gordon William Schoen stated to your affiant that during the purchase of said firearms, he did not execute any sworn statements so prescribed by the Title 18 USC Section 922(c).

All of the aforementioned firearms purchased by Mr. Schoen were turned over to your affiant by Mr. Schoen subsequent to each controlled buy.

APPENDIX K

[SEAL]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
Washington, D.C. 20226

30 Jul. 1979

Honorable S. I. Hayakawa
United States Senate
Washington, D.C. 20510

Dear Senator Hayakawa:

This is in reference to your letter of May 10, 1979, wherein you requested our comments on the abuses referred to in the article attached to your letter entitled "BATF Entrapment Schemes" by David T. Hardy.

The first portion of Mr. Hardy's article discusses "straw man entrapment" or the straw purchase. We emphasize that it is not the practice of ATF to conduct an undercover investigation regarding unlawful sales by firearms licensees unless there is reason to believe that the licensee has previously made unlawful sales. If the firearms licensee is reluctant to deal with the undercover agent, ATF immediately terminates its investigation. Furthermore, it is the Bureau's practice to permit the firearms licensee himself to suggest the medium of a straw purchaser to consummate the sale.

Thus, it is strictly prohibited for ATF undercover agents to encourage, as opposed to merely provide the opportunity for, such unlawful sales of firearms. In all instances, ATF agents seek to comply with the rules laid down by the Supreme Court concerning entrapment. In *United States v. Russell*, 411 U.S. 433, 435-436 (1973), the United States Supreme Court ruled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense

does not defeat the prosecution. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play. Of course, any defendant having been unlawfully entrapped into commission of a crime has a valid defense to the prosecution.

The use of straw purchasers in acquiring firearms from licensees presents a serious law enforcement problem. These transactions thwart the intent of the Gun Control Act to keep firearms out of the hands of prohibited persons, as well as to regulate interstate commerce in firearms. Typically, the actual or ultimate purchaser is a felon or out-of-State resident to whom a licensee is prohibited from selling or delivering firearms. By utilizing a straw purchaser, who is himself eligible to obtain firearms, the prohibited person is able to acquire the firearm "off record" and conceal the transaction. Firearms acquired in this manner are frequently used in crime. For example, the firearm used by David Berkowitz, also known as "Son of Sam," in the murder of several persons in New York was purchased from a licensed dealer in Texas by a Texas resident acting on Berkowitz's behalf.

While there is a continuing need to monitor straw purchase transactions, you may be interested in knowing that we have implemented internal controls to ensure that investigations of these cases are kept within proper limits and that only those cases warranting Federal prosecution are investigated. That is to say, any such investigation must be personally approved by the Director or the Deputy Director (the same is true with regard to investigations of firearms transactions at gun shows).

Furthermore, we are seeking to impact upon the problem of straw purchases by informing all licensees how to avoid those transactions which are contrary to law. A publication serving this purpose will be issued within the next few days.

In his article, Mr. Hardy alleges a second form of entrapment entitled "implied dealership" which he claims is used against collectors and those displaying firearms at gun shows. Under Federal firearms laws, a nonlicensed resident of the State in which the show is being held may buy, sell or exchange personal firearms with another nonlicensee of the same State. The resident may also sell to or place an order to buy firearms with a licensed firearms dealer, provided the resident does not "engage in the business" of dealing in firearms which requires a license under the Gun Control Act of 1968. Although the term "engaged in business" is not defined by statute, the courts have had no difficulty construing the term and have generally held it to mean an activity which occupies one's time, attention and labor for the purpose of livelihood or profit. While an actual profit from the sales of firearms need not be proved, a willingness to deal, a profit motive and a greater degree of activity than occasional sales by a hobbyist must be shown for purposes of a conviction. Thus, a nonlicensed resident may make an occasional sale as a hobbyist at a gun show or an individual may dispose of a gun collection at a gun show. However, if the nonlicensed person is acquiring firearms for the purpose of resale and the activities otherwise constitute engaging in a firearms business as discussed above, a violation of law would result. In investigations of such activities, ATF adheres to the rules concerning entrapment.

As a third form of entrapment, Mr. Hardy alleges that ATF agents approach a Federally licensed dealer and persuade the dealer to sell some privately owned firearms without making a record of the transaction. ATF's efforts are directed at those licensees who, as a part of their business, at or away from their licensed premises sell firearms to ineligible purchasers and fail to record the transaction as a means of concealment. We reiterate that ATF agents, in making such investigations are mindful of the law of entrapment.

ATF recognizes that a licensee may maintain a private collection of firearms independent of the business inventory and lawfully dispose of such firearms without entering the transaction in the licensee records. As stated in ATF Industry Circular 72-30, a licensee who uses the firearms license to obtain personal firearms must record in the business records the acquisition and disposition. Such firearms may be kept on the licensee's business premises for purposes of display or decoration and not for resale as long as they are segregated from the business inventory by appropriate identification. The licensee's subsequent sale of such personal firearms need not be recorded in the business records and a form 4473 executed by the purchaser would not be required.

With respect to Mr. Hardy's discussion of "Dewat Entrapment," the term "Dewat" technically denotes war trophy firearms that were deactivated under a program inaugurated in 1945 to permit returning servicemen to register their trophies under the National Firearms Act so that they could be retained. However, we construe Mr. Hardy's discussion as pertaining to any and all inoperable or unserviceable machineguns, including "Dewats."

The National Firearms Act (26 U.S.C., Chapter 53) requires, among other things, the registration of machineguns and the payment of taxes on transactions in such weapons. The term "machinegun" is defined by the Act to include any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term also includes a machinegun frame or receiver alone. It should also be noted that an unserviceable machinegun (one that cannot be readily restored to an operable condition) is still a machinegun within the scope of the Act. Consequently, Mr. Hardy's inference that inoperable or unserviceable machineguns should not be held to be National Firearms Act weapons is wholly without merit.

The 1968 amendments to the National Firearms Act provided a 30-day amnesty period during which previously unregistered weapons could be registered by their possessors with impunity. Thereafter, only those weapons already registered and those registered pursuant to being lawfully made could be legally possessed or transferred. In short, a person in possession of an unregistered machinegun today cannot legitimize his possession of the weapon. The unregistered weapon is contraband and subject to seizure or abandoned to the Government. We would add that where the possessor's violation is nonwillful, criminal prosecution is not undertaken.

Mr. Hardy's discussion of practice grenades relates to the category of National Firearms Act weapons termed "destructive devices." In part, this term includes explosive bombs, grenades or similar devices. He cites the ATF case reported as *United States v. Kilivan*, 456 F.2d 555 (8th Cir. 1972), which, he infers, was erroneously decided. The court in *Kilivan* held that certain M-21 practice grenades were destructive devices for purposes of the National Firearms Act. Subsequent to the decision in *Kilivan*, other courts held that the M-21 practice grenade and other items designed by the military establishment for training or practice purposes did not constitute National Firearms Act weapons since devices which were neither designed nor redesigned for use as weapons were excluded from the term destructive device. Adhering to the weight of authority, ATF reversed its position and no longer considers such devices in their original configuration as National Firearms Act weapons.

In his heading entitled "Other Techniques," Mr. Hardy depicts a less than accurate situation regarding two-hand grip "silhouette" pistols. He states that ATF issued a "special" regulation under the National Firearms Act so as to bring such weapons within the scope of the Act for prosecution purposes. We disagree. This regulation defining "pistol" was added to the Code of Federal Regula-

tions on August 3, 1971, or approximately six years before silhouette pistols came into the limelight. Some of these weapons now technically fall within the Act's definition of firearm; however, we know of no prosecution under the Act regarding a silhouette pistol. During the last 2 years, a number of manufacturers of silhouette pistols have sought and obtained ATF's advice and counsel regarding the proper design to be employed in manufacturing these firearms so that they would not be included within the coverage of the Act.

We trust that this has been responsive to your inquiry. If we can be of further assistance in any way, please let us know.

Sincerely yours,

/s/ John G. Krogman
Acting Director

APPENDIX L

Letter of Director of BATF regarding disposition of "personal" firearms (April 7, 1980)

(Lodged with the Court)

DEPARTMENT OF THE TREASUR BUREAU OF ALCOHOL, TOBACCO AND FI. ARMS

FIREARMS TRANSACTION RECORD

PART I – INTRA-STATE OVER-THE-COUNTER

TRANSFEROR'S TRANSACTION NO.

NOTE: Prepare in original only. All entries other than signatures must be typed or clearly printed in ink. All signatures on this form must be in ink.

SECTION A – MUST BE COMPLETED PERSONALLY BY TRANSFEREE (BUYER) *(See Notice and Instructions on reverse.)*

1. TRANSFEREE'S *(Buyer's)* NAME *(Last, First, Middle) (Mr., Mrs., Miss)*	2. HEIGHT	3. WEIGHT	4. RACE

5. RESIDENCE ADDRESS *(No., Street, City, State, Zip code)*	6. DATE OF BIRTH	7. PLACE OF BIRTH

8. CERTIFICATION OF TRANSFERREE *(Buyer)* – An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question:

a. Are you under indictment or information in any court for a crime punishable by imprisonment for a term exceeding one year?		d. Are you an unlawful user of, or addicted to, marijuana, or a depressant, stimulant, or narcotic drug?	
b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year. Also, a "yes" answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement of rehabilitation statute.)		e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?	
		f. Have you been discharged from the Armed Forces under dishonorable conditions?	
		g. Are you an alien illegally in the United States?	
c. Are you a fugitive from justice?		h. Are you a person who, having been a citizen of the United States, has renounced his citizenship?	

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S *(Buyer's)* SIGNATURE	DATE

SECTION B – TO BE COMPLETED BY TRANSFEROR (SELLER) *(See Notice and Instructions on reverse.)*

THE PERSON DESCRIBED IN SECTION A:
- ☐ IS KNOWN TO ME
- ☐ HAS IDENTIFIED HIMSELF TO ME IN THE FOLLOWING MANNER

9. TYPE OF IDENTIFICATION *(Driver's License, etc. Positive identification is required. A Social Security card is not considered positive identification.)*	10. NUMBER ON IDENTIFICATION

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver or otherwise dispose of the firearm described below to the person identified in Section A.

11. TYPE *(Pistol, Rifle, etc.)*	12. MODEL	13. CALIBER OR GAUGE	14. SERIAL NO.

15. MANUFACTURER *(and Importer, if any)*

16. TRADE/CORPORATE NAME AND ADDRESS OF TRANSFEROR *(Seller) (Hand stamp may be used.)*	17. FEDERAL FIREARMS LICENSE NO.

18. TRANSFEROR'S *(Seller's)* SIGNATURE	19. TRANSFEROR'S TITLE	20. TRANSACTION DATE

ATF F 4473 (5300.9) PART I (2-77) EDITION OF 3-76 MAY BE USED

IMPORTANT NOTICES TO TRANSFEROR (SELLER) AND TRANSFEREE (BUYER)

1. Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90-351, 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under Chapter 44 may determine if he may lawfully sell, deliver or transport a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms. This form should not be used for sales of transfers where neither person is licensed under 18 U.S.C. Chapter 44.

2. The transferee (buyer) of a firearm should be familiar with the provisions of law. Generally, 18 U.S.C. Chapter 44 prohibits the shipment, transportation or receipt in interstate commerce of a firearm by one who is under indictment or information for, or who has been convicted of a crime punishable by imprisonment for a term exceeding one year, by one who is a fugitive from justice, by one who is an unlawful user of, or addicted to marijuana or a depressant, stimulant or narcotic drug, or by one who has been adjudicated mentally defective or who has been committed to a mental institution. In addition, Title VII (18 U.S.C. Appendix 1201-1203) makes it unlawful for anyone who has been convicted of a crime punishable by imprisonment for a term exceeding one year, who has been discharged from the Armed Forces under dishonorable conditions, who has been adjudicated mentally incompetent, who, having been a citizen of the United States, has renounced his citizenship, or who is an alien illegally in the United States, to possess a firearm.

INSTRUCTIONS TO TRANSFEREE (BUYER)

1. The buyer (transferee) of a firearm will, in every instance, personally complete Section A of the form and certify (sign) that the answers are true and correct. If, because of inability of the buyer to read or write, the answers are written by another person, this person and another person will sign as witnesses to the buyer's answers and/or signature.

2. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business will complete and sign Section A of the form and attach a written statement, executed under the penalty of perjury, stating

(a) that the firearm is being acquired for the use of and will be the property of that business entity, and

(b) the name and address of that business entity.

INSTRUCTIONS TO TRANSFEROR (SELLER)

1. Should the buyer's name be illegible the seller shall print the buyer's name above the name printed by the buyer.

2. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

3. If more than one firearm is involved, the identification required by Section B, Items 11 through 15, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than one weapon may be on a separate sheet of paper which must be attached to the form covering the transaction.

4. The transferor (seller) of the firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of the Gun Control Act of 1968 (18 U.S.C. Chapter 44) and Title VII, Unlawful Possession or Receipt of Firearms, (82 Stat. 197), and 27 CFR Part 178 (Commerce in Firearms and Ammunition).

5. Upon completion of the firearm transaction, the transferor (seller) must make a part of his permanent firearms records the Form 4473 (5300.9) Part I recording that transaction and any supporting documents. Form 4473 (5300.9) Part I and any supporting documents must be filed either chronologically by date of transaction, alphabetically by name of transferee (buyer), or numerically by transaction number if the transferor assigns transaction numbers to Form 4473 (5300.9) Part I.

6. In addition to completing this record, the licensee shall report any multiple sale or other disposition of pistols or revolvers on ATF F 3310.4, in accordance with 27 CFR 178.126a.

7. Additional forms are available from:

Bureau of Alcohol, Tobacco and Firearms
ATF Distribution Center
3800 S. Four Mile Run Drive
Arlington, Virginia 22206

DEFINITIONS

1. *Intra-State Over-the-Counter Transaction* – The sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the state in which the transferor's business is located, occurring on the transferor's business premises.

2. *Published Ordinances* – The publication (ATF P 5300.5) containing those State laws and local ordinances relevant to the enforcement of Chapter 44 of the Title 18, U.S.C., which is annually published in the Federal Register and distributed to each Federal firearms licensee by the Director, Bureau of Alcohol, Tobacco and Firearms.

U.S. Government Printing Office: 197 724-270

DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

FIREARMS TRANSACTION RECORD

PART II – CONTIGUOUS-STATE OR NON-OVER-THE-COUNTER

TRANSFEROR'S TRANSACTION NO.

NOTE: PREPARE IN DUPLICATE. ALL ENTRIES OTHER THAN SIGNATURES MUST BE TYPED OR CLEARLY PRINTED IN INK. ALL SIGNATURES ON THIS FORM MUST BE IN INK.

SECTION A - MUST BE COMPLETED PERSONALLY BY TRANSFEREE OR BUYER (See notices and instructions on reverse)

1. TRANSFEREE'S *(Buyer's)* NAME *(Last, First, Middle) (Mr., Mrs., Miss.)*	2. HEIGHT	3. WEIGHT	4. RACE

5. RESIDENCE ADDRESS *(No., Street, City, State, Zip Code)*	6. DATE OF BIRTH	7. PLACE OF BIRTH

8. CERTIFICATION OF TRANSFEREE *(Buyer)* – An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question:

a. Are you under indictment or information in any court for a crime punishable by imprisonment for a term exceeding one year?		d. Are you an unlawful user of, or addicted to marihuana or a depressant, stimulant or narcotic drug?	
b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year. Also, a "yes" answer is required even if a conviction has been discharged, set aside, or dismissed pursuant to an expugment or rehabilitation statute.)		e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?	
		f. Have you been discharged from the Armed Forces under dishonorable conditions?	
		g. Are you an alien illegally in the United States?	
c. Are you a fugitive from justice?		h. Are you a person who having been a citizen of the United States, has renounced his citizenship?	

Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am 21 years or more of age, or that, in the case of a shotgun or a rifle, I am 18 years or more of age; that I am not prohibited by the provisions of Chapter 44 of Title 18, United States Code, from receiving a firearm in interstate or foreign commerce, and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are:

TITLE	NAME

ADDRESS

I also hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S *(Buyer's)* SIGNATURE	DATE

SECTION B - MUST BE COMPLETED BY TRANSFEROR OR SELLER (See notices and instructions on reverse)

On the basis of (1) the statements in Section A; (2) my notification of the chief law enforcement officer designated above; and (3) the information in the current list of Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm described below to the person identified in Section A.

9. TYPE *(Pistol, Rifle, etc.)*	10. MODEL	11. CALIBER OR GUAGE	12. SERIAL NO.

13. MANUFACTURER *(and importer, if any)*

14. TRADE/CORPORATE NAME AND ADDRESS OF TRANSFEROR *(Seller) (Hand stamp may be used)*	15. FEDERAL FIREARMS LICENSE NO.

16. TRANSFEROR'S *(Seller's)* SIGNATURE	17. TRANSFEROR'S TITLE	18. TRANSACTION DATE

ATF F 4473 (5300.9) PART II (10-76) EDITION OF 2-75 MAY BE USED

IMPORTANT NOTICES TO TRANSFEROR (SELLER) AND TRANSFEREE (BUYER)

1. Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90-351, 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under Chapter 44 may determine if he may lawfully sell, deliver or transport a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms. This form should not be used for sales or transfers where neither person is licensed under 18 U.S.C. Chapter 44.

2. The transferee (buyer) of a firearm should be familiar with the provisions of law. Generally, 18 U.S.C. Chapter 44 prohibits the shipment, transportation or receipt in interstate commerce of a firearm by one who is under indictment or information for, or who has been convicted of a crime punishable by imprisonment for a term exceeding one year, by one who is a fugitive from justice, by one who is an unlawful user of, or addicted to marihuana or a depressant, stimulant or narcotic drug, or by one who has been adjudicated mentally defective or who has been committed to a mental institution. In addition, Title VII (18 U.S.C. Appendix 1201-1203) makes it unlawful for anyone who has been convicted of a crime punishable by imprisonment for a term exceeding one year, who has been discharged from the Armed Forces under dishonorable conditions, who has been adjudicated mentally incompetent, who, having been a citizen of the United States, has renounced his citizenship, or who is an alien illegally in the United States, to possess a firearm.

NOTICE TO LAW ENFORCEMENT OFFICIALS

This copy of ATF Form 4473, Part II, is to advise you of a firearms transaction involving a resident in your jurisdictional area. The firearm described in Section B will not be shipped or delivered to the transferee (buyer) identified in Section A for a period of at least seven days following receipt of the notification of your acceptance or refusal of delivery, by registered or certified mail of the form.

INSTRUCTIONS TO TRANSFEREE (BUYER)

1. The buyer (transferee) of a firearm will, in every instance, personally complete Section A of the form and certify (sign) that the answers are true and correct. If, because of inability of the buyer to read or write, the answers are written by another person, this person and another person will sign as witnesses to the buyer's answers and/or signature.

2. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business will complete and sign Section A of the form and attach a written statement, executed under the penalty of perjury, stating

   (a) that the firearm is being acquired for the use of and will be the property of that business entity, and
   (b) the name and address of that business entity.

INSTRUCTIONS TO TRANSFEROR (SELLER)

1. Should the buyer's name be illegible the seller shall print the buyer's name above the name printed by the buyer.

2. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

3. If more than one firearm is involved, the identification required by Section B, Items 9 through 13, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than one weapon may be on a separate sheet of paper which must be attached to the form covering the transaction.

4. The transferor (seller) of a firearm in a contiguous-State of non-over-the-counter transaction must forward by registered or certified mail (return receipt requested) the copy of the form to the chief law enforcement officer of the transferee's (buyer's) locality of residence. The transferor must delay shipment of delivery of the firearm for a period of at least 7 days following receipt of the post office notification of the acceptance or non-acceptance of the envelope. The transferor will retain as a part of the records required to be kept by 18 U.S.C. Chapter 44, the original form with evidence of the receipt or rejection of the notification forwarded to the chief law enforcement officer of the transferee's locality of residence.

5. The transferor (seller) of the firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of the Gun Control Act of 1968 (18 U.S.C. Chapter 44) and Title VII, Unlawful Possession or Receipt of Firearms, (82 Stat. 197), and 27 CFR Part 178 (Commerce in Firearms and Ammunition).

6. Upon completion of the firearm transaction, the transferor (seller) must make a part of his permanent firearms records the original form recording that transaction and any supporting documents. The original form and any supporting documents must be filed either chronologically by date of transaction, alphabetically by name of transferee (buyer), or numerically by transaction number if the transferor assigns transaction numbers to Form 4473 (5300.9) Part II.

DEFINITIONS

1. *Contiguous-State Transaction*—The sale or other disposition of a rifle or shotgun to the resident of a contiguous State which has enacted legislation permitting residents of that State to purchase rifles or shotguns outside the State.

2. *Non-over-the-Counter Transaction*—A mail-order transaction to the resident of the State in which the transferor's (seller's) premises are located.

3. *Published Ordinances*—The publication (ATF P 5300.5) containing those State laws and local ordinances relevant to the enforcement of 18 U.S.C. Chapter 44, which is annually published in the Federal Register and distributed to each Federal firearms licensee by the Director, Bureau of Alcohol, Tobacco and Firearms.

899

APPENDIX O

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM 77-0598

UNITED STATES OF AMERICA

v.

RICHARD BOULIN

Baltimore, Maryland

April 7, 1978

The above-entitled matter came on for hearing before His Honor, Herbert F. Murray at 10:00 a.m.

APPEARANCES

For the United States:

Marsha A. Ostrer, Esquire

For the Defendant:

George Beall, Esquire &
William P. Crewe, Esquire

• • • •

[22] Q. Now, getting back to the first visit you had with the Bureau of Alcohol and Tobacco Tax, could you describe to this Court what the nature of that visit was and what occurred?

A. All right. What it is, they periodically inspect for record keeping and inventory. They called me at work one day. I don't recall the investigator's name. He said,

"I need to come out and check your records for a routine audit." He said, "I'd like to come out today." I said, "No, sir, that's not possible because I do not keep the firearms here at my work. They're kept at home and the records are kept at home. Therefore, I would have nothing to show you."

So he said, "Well, when can I come inspect them?" So I said we can do it at this time, this time, this time. He said, well, we'll make it on this day, and then he decided to come to my house since everything was located there.

Q. Did he conduct an examination of your records at that time?

A. He came to my house. He conducted a thorough investigation of my books and my record keeping and my [23] inventory, to which he told me I passed with flying colors. There were no problems whatsoever. We had a long discussion about different firearms regulations and laws. I was trying to get an understanding because I was a new dealer.

He also came back and looked at my personal collection of firearms, admired them, and we discussed a few of the firearms. He told me I had a very nice collection.

Q. Were you subsequently audited by the A. T. F.?

A. I was audited the second time during the course of my license. It was approximately six or eight months afterwards. At that time the agent did the same thing, called me at my work. I explained to him again that I did not keep the records or the firearms there. He said, "Fine.". He said, "When can we do it?" I gave him some possibilities and we set up a date. He came in the morning one day at nine o'clock and we went through the inventory at work. I brought my inventory down in the car and my records were already on my desk. We went out to the car and got my inventory and brought it in so he could audit it.

Q. Did you have any discussion with him then?

A. Yes, sir. Obviously, since he was there from approximately nine o'clock until one or two o'clock, we had a good bit of conversation.

Q. Did you have any discussion with him of selling personal guns?

[24] A. Yes, sir, because there was some unclarity in the federal firearms regulations about personal firearms and I was trying to clarify it in my mind. Some opinions that he gave me were different than what were in the books and different than what the procedures were. Some of them were consistent.

Q. Was anything resolved between the two of you?

A. Basically the premise that I understood was anything that was acquired through my business, as a result of my business, or directly in exchange of another firearm in my business, I had to run through my books. Anything that was acquired away from my business, without the use of my federal firearms license, without the use of my business title, I was allowed to run through as any other person or citizen in the State of Maryland.

Q. Mr. Boulin, did you have any other discussion with the agents while your residence was under seizure?

A. Oh, yes, sir. We had numerous discussions. I was very upset. You have to understand that this was my life savings that they were about to take down. They came in with postal bags. They were going to take very, very expensive firearms and put them in postal bags which I had only handled with gloves myself, so you can imagine the shock that this was to me. I tried to explain to them over and over again what was for sale because it was differentiated by room. They could not do anything so they said, "Well, we'll call Baltimore." The agent in charge went on the phone and called Baltimore collect, and Baltimore told him—he came back and told me what they said, and that was to seize everything, every firearm and ammunition. And I showed him where each individual weapon was located. They found nothing that I did not tell them was there. I showed them where everything was and how they could safely be handled. I tried to cooperate with them to the utmost.

Q. Were all those guns yours, Mr. Boulin?

A. All those guns were mine with the exception of one and my wife's guns.

Q. What was the gun that did not belong to you?

A. I had a rifle that belonged to a police friend of mine, my ex-partner, George Theodore. He had given it to me to get a new clip put in it and to get some stock work done to it because I had an acquaintance up in Pennsylvania, a gunsmith that does excellent work and he asked me if I'd get it for him at a moderate price.

Q. Did you tell the officers that this did not belong to you?

A. Yes, sir, I certainly did, at the time they picked it up.

Q. Did you point out to them the guns that did not belong to you, that belonged to your wife?

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APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. HM 77-0598 Criminal

THE UNITED STATES OF AMERICA

v.

RICHARD BOULIN

Baltimore, Maryland

June 9, 1977

The above-entitled matter came on for hearing of motions before the Honorable Herbert F. Murray at 3:30 p.m.

APPEARANCES

For the United States of America:

Marsha A. Ostrer, Esquire

For the Defendant:

George Beall, Esquire
William P. Crewe, Esquire

* * * *

[52] By Ms. Ostrer:

Q. Now, directing your attention to the October 1st transcript, page 9 of that transcript, Mr. Boulin quotes a price to somebody at the gun show, is that correct?

A. Yes ma'am. The Greenbelt Armory.

Q. And the 6th notation down, the last sentence, Mr. Boulin is quoting a price to another individual on a weapon, a 550, serial number 579. Did you attempt to locate those in Mr. Boulin's records?

A. Yes, I did. I was unable to locate them in any of the records.

Q. Would you explain to his honor the difference between the slang term "on paper" and "off paper"?

A. Yes. On paper means the firearm must go through the proper procedures to be sold. Must be reflected in the bound book and on form 4473. Off paper means that the procedure is avoided and there is no paperwork to be completed thus not being able to trace the firearm back to the buyer.

Q. Is that in fact a violation of the law?

A. If it is done by a federal licensed firearms dealer, yes, it is a violation.

Ms. Ostrer: No further questions, your honor.

CROSS-EXAMINATION

By Mr. Crewe:

[53] Q. Mr. McMonagle, you did prepare the affidavit for the search warrant?

A. Yes, I did.

Q. Do you remember what is says?

A. It has been since December since I have seen it.

Q. I would like you to look at page 3 and see if that is a correct statement there?

A. Any particular part on page 3?

Q. The last paragraph on page 3.

A. Yes.

Q. You say that is your statement?

A. That is my statement.

Q. Sworn before the magistrate?

A. That is correct.

Q. Are you familiar with the telephone discussion of December 6, 1977 between Mr. Schoen and Mr. Boulin?

A. Yes, I am.

Q. Would you review that and find out whether Mr. Schoen said he was in the market to buy more firearms off paper, as quoted in your affidavit, "off paper,"?

(Pause.)

A. No, it is not on there.

Q. This affidavit was executed under oath, wasn't it?

A. That is correct.

Q. I also ask you to check and see—

[54] The Court: Could I see the affidavit?

Mr. Crewe: That is just a copy, your honor. I think it is in evidence.

Ms. Ostrer: I don't believe the affidavit has ben introduced in evidence. The original should be in the court file.

Your honor, I may be able to be of some assistance.

This is the one, your honor.

The Court: Where were you referring to?

Mr. Crewe: The one that I have, your honor, page three, the bottom paragraph.

The Court: What I was wondering about was: if what is contained on the last ten lines or so of page two and the first six lines of page three of the December 6 telephone conversation have any connection to what is in that paragraph of the affidavit?

The Witness: It does, your honor.

Your honor, I reflected what Mr. Schoen said to me. I did not reflect what I heard. Mr. Schoen reflected that statement to me. I asked if "off paper" was used and he said yes. Maybe he was actually making reference to the same way he did it before, which was off paper.

* * * *

APPENDIX Q

Telephone Conversation between Richard Boulin and Gordon Schoen—Date: 12/6/77; Time 7:32 p.m.

Boulin: Hello.
Schoen: Richard.
Boulin: Yeah.
Schoen: Gordon, how you doing?
Boulin: How you doing?
Schoen: What do you know?
Boulin: Not a whole lot.
Schoen: Trying to get to you.
Boulin: Is that right?
Schoen: Yeah, couple of times.
Boulin: Well, I'm not home much, you know. I work a lot.
Schoen: Yeah.
Boulin: Try to earn a living.
Schoen: Well I tried to get you down at the office too, they told me to call you down there if I couldn't get you at home.
Boulin: Is that right?
Schoen: Yeah, she said you weren't there.
Boulin: Hm, well I'm out in the field a lot you know that.
Schoen: Oh okay.
Boulin: So, what's up.
Schoen: Not much, what you got, anything good?
Boulin: Uh, let's see, what have I got left? Hm, I got an Army 45 I would probably move, I got some commemoratives, but you don't want any commemoratives.
Schoen: Well, that depends.
Boulin: What do you mean?
Schoen: (Unintelligible) about the money.
Boulin: Oh, is that right?
Schoen: Uh huh.
Boulin: You did or you will?

Schoen: I am, next week, Monday a guy's gonna be here.

Boulin: I got a Missouri single action 45 long Colt.

Schoen: Uh huh.

Boulin: I've got, matter of fact I've got two of those. I got a Missouri 22.

Schoen: What do you want for them?

Boulin: Uh, let's see, 375 probably.

Schoen: Uh huh.

Boulin: Brand new, mint too.

Schoen: Yeah.

Boulin: One of them's serial number 102.

Schoen: Uh huh.

Boulin: Then I got serial number 103 in 22, in other words, the consecutive one to it.

Schoen: Uh huh.

Boulin: And let's see, then I've got a Nevada, a Sam Colt, they're all commemoratives. Then I've got a Pat Garret commemorative you've seen that one.

Schoen: Right yeah.

Boulin: Sold that. Uh I've got an Army 45 it's super mint.

Schoen: All those commemoratives have to go on paper?

Boulin: As of right now yeah, you know what I mean.

Schoen: No.

Boulin: Huh

Schoen: (Unintelligible)

Boulin: Well you know how it is, you know, on the telephone, Right?

Schoen: Oh, okay.

Boulin: So, I mean I got to do everything right.

Schoen: Right.

Boulin: And um,

Schoen: In other words, we do them like we did them before.

Boulin: Right.

Schoen: Okay.

Boulin: I got uh an Army 45 super mint.

Schoen: Uh huh.

Boulin: I still got that Ruger 40, I hadn't really parted with those Rugers you know what I mean, cause they're in my collection.

Schoen: Good, I'm glad cause that's why I'm trying to get you.

Boulin: Is that right?

Schoen: Yeah.

Boulin: You know, well you know the only reason I was going to sell those is if I got top dollar or I wouldn't sell them. (Unintelligible)

Schoen: Well, in order words you got a mess of stuff down there.

Boulin: Yeah, right.

Schoen: Well, how much money you think I need to bring with me?

Boulin: All depends on how much you want to buy. If you're really looking to buy you know, to get a lot I'd say two, three thousand.

Schoen: Okay, that's no problem.

Boulin: It's up to you.

Schoen: Aren't you afraid of keeping them guns at the house?

Boulin: Well I got two, can you hear my dogs.

Schoen: Yeah.

Boulin: I got two bigs shepherds. One of them was a police dog for eight years.

Schoen: Uh huh.

Boulin: And my wife's home all the time when I'm not, cause *(unintelligible)* she never goes to the store unless I'm home. So you know that's another safeguard.

Schoen: Well that's not too bad.

Boulin: And uh.

Schoen: What you have a vault or anything you keep them in.

Boulin: Yeah right.

Schoen: Well that's

Boulin: I got, they're pretty well secured.
Schoen: That's good.
Boulin: There's an alarm system in the house.
Schoen: Uh huh.
Boulin: Well they'd have a pretty tough time going by.
Schoen: Man.
Boulin: You got to remember this neighborhood here is 68 houses in the neighborhood, and 37 are owned by policemen.
Schoen: Jesus.
Boulin: So, it's like a police ghetto. You know what I mean. There's one street here if you go up and down the street, every, every street on both sides, every house on both sides got a police car in it.
Schoen: Uh huh.
Boulin: It's like a police community. Matter of fact you know the realtor was telling us the property value down here, up here
Schoen: Yeah.
Boulin: Are being affected cause there's too many policemen up here and a lot of people won't move up here.
Schoen: Why?
Boulin: Cause they don't like living with this many cops. They feel as though you know they'll be watched. Everything they do.
Schoen: Well, then if if if they're not doing anything wrong, they got nothing to worry about.
Boulin: Right, you know how people are, you know. They think the cops are going to be spending their off duty time trying to catch them j-walking.
Schoen: Great.
Boulin: You know how people are.
Schoen: Yeah, I'd rather live in that type area.
Boulin: Sure, they only had one burglary in here in five years and they caught the guy before he even got out of the house. Matter of fact they were, they were fighting over who was going to shoot him. So you know that, that kind of makes you feel a little better.

Schoen: You say I could come down Wednesday evening

Boulin: I don't see any reason why not.

Schoen: Okay.

Boulin: Tomorrow night then right?

Schoen: Huh, no, next Wednesday.

Boulin: Oh, next Wednesday.

Schoen: Yeah.

Boulin: Yeah, no problem.

Schoen: Okay, you want to give me directions?

Boulin: Well, wait a minute, Greenbelt's this weekend isn't it?

Schoen: Yeah.

Boulin: You doing Greenbelt?

Schoen: Well, I'll tell you, my grandmother is awful sick.

Boulin: Oh okay.

Schoen: And, as close as the family is, see that's my mother's mother.

Boulin: Uh huh.

Schoen: I don't know whether I'm going to be there or not. Now I paid him for the tables.

Boulin: Uh huh.

Schoen: And I told him if I'm not there Saturday, I might be there Sunday. But I don't, you know, what can happen cause she's ah got pneumonia really bad.

Boulin: Really, I'm sorry to hear that.

Schoen: And uh, well as close as I've been to her and, you know.

Boulin: Right.

Schoen: (*Unintelligible*) I'd hate to be away if something happened to her.

Boulin: Oh, I can understand that.

Schoen: So.

Boulin: Well, you can slide down whenever you feel like it I mean you know, if you change your mind another night, let me know.

Schoen: Well, can you give me directions?

Boulin: Oh, sure.
Schoen: Slowly.
Boulin: Slowly, huh?
Schoen: Let's see I'd be comin uh
Boulin: Just come right down 27.
Schoen: Okay.
Boulin: Okay.
Schoen: Wait a minute.
Boulin: Get into Damascus right?
Schoen: Yeah.
Boulin: You know where I'm talking about?
Schoen: Yeah.
Boulin: All right there's one traffic light, right?
Schoen: Yeah.
Boulin: You make a left.
Schoen: I make a left?
Boulin: You make a left.
Schoen: Okay.
Boulin: You know how it dead ends as you're coming down 27 dead ends.
Schoen: Yeah right.
Boulin: Go either left or right, you go left.
Schoen: Okay.
Boulin: All right, you go approximately a quarter of a mile and there's the first road on your right, Woodfield Road.
Schoen: Wait a minute.
Boulin: In other words, you make a left and then your immediate right.
Schoen: Yeah.
Boulin: Okay.
Schoen: Uh huh.
Boulin: Come down that road approximately two miles and on your left you'll see Hawkins Creamery Road, H A W K I N S, separate word Creamery, C R E A M - E R Y.
Schoen: Uh huh.
Boulin: Okay, now you go to 8700, 8 7 0 0,

Schoen: Yeah.

Boulin: Is where I live.

Schoen: Okay.

Boulin: Okay, it's right, it's right as you come into the new development, in other words once you get on Hawkins Creamery you'll come in about two miles and you'll see a new development, you'll be coming down hill and then up hill, I'm at the top of the hill.

Schoen: Okay, wait a second, I want to read this all back to you to make sure I got it right.

Boulin: Okay.

Schoen: Okay, take route 27 till it deadends at Damascus.

Boulin: Right.

Schoen: Turn left, go approximately a quarter of a mile

Boulin: Right.

Schoen: And turn right.

Boulin: Okay that's Woodfield Road or Route 124.

Schoen: Right, okay, go two miles to Hawkins Creamery Road.

Boulin: Right, now you got to be careful cause there's a fork there, in other words it's it's a hard intersection to see, so just drive slow.

Schoen: Which way do I go on Hawkins Creamery?

Boulin: Going left.

Schoen: Okay, left, that's 8700, it's

Boulin: Right.

Schoen: A new development on the top of the hill.

Boulin: Right, I'm on the house on the right, right on the corner.

Schoen: Okay, I'll definitely be there Wednesday.

Boulin: Okay.

Schoen: Okay because uh there, there isn't any conflicting things Wednesday.

Boulin: Well everything I'm selling is mine so I mean I don't really feel too bad about it, you know what I'm sayin'.

Schoen: Uh huh.

Boulin: It's all my stuff so they really can't say a whole hell of a lot.

Schoen: The uh, let's see,

Boulin: Are you going to re-sell this stuff or what?

Schoen: Oh sure, some of it. Now those commemoratives, I don't know.

Boulin: Uh huh.

Schoen: Uh, I think the best time for me would be about betwen 7:30 and 8.

Boulin: That's fine for me cause I'll be home by then.

Schoen: Okay, good enough.

Boulin: Okay, so you want to make it next Wednesday.

Schoen: Yeah.

Boulin: Okay.

Schoen: Definitely, definitely now, I will be there. Don't forget.

Boulin: I won't forget you.

Schoen: Okay, (unintelligible)

Boulin: Well I need the money.

Schoen: Okay, cause I told you the other night but you said you weren't going to be home until nine. Did she tell you I called?

Boulin: um, no, she sure didn't.

Schoen: Yeah.

Boulin: I'll chew her out as soon as you get off the phone.

Schoen: No, don't worry about that.

Boulin: She didn't tell me because

Schoen: (Unintelligible) I told her to tell you just tell him Gordon called.

Boulin: I didn't get home till 10:30 and then you said you'd call back so she didn't tell me.

Schoen: Well, I called, a, let's see I think it was quarter after nine and I didn't get an answer.

Boulin: Hm, okay, well

Schoen: So, that's that.

Boulin: Well, I try to do a lot of stuff you know, I probably trying to do too much.

Schoen: Uh huh.

Boulin: Okay.

Schoen: Okay, Rick, if I don't see you this weekend, I'll definitely see you Wednesday.

Boulin: If the dogs bark at you when you pull in the driveway

Schoen: Uh huh.

Boulin: Don't worry about them as long as we're home they ain't going to bite you.

Schoen: Okay.

Boulin: Even the big one, he won't bother you as long as we're home. If we weren't home, it's a different story.

Schoen: All right.

Boulin: Cause as soon as we put him on his on his chain he knows he's a guard dog then you know, that's the way he was trained.

Schoen: Uh huh.

Boulin: And he'll go bananas.

Schoen: Okay.

Boulin: Okay.

Schoen: Good enough.

Boulin: Bye.

Schoen: Talk to ya.

83-419

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

OFFICE OF THE DIRECTOR

APR 07 1980

CC-29,163 FE:JBP

Lynn Battaglia
Assistant U.S. Attorney
101 W. Lomard Street
Baltimore, MD 21201

Dear Ms. Battaglia:

This refers to your inquiry as to the correctness of a letter from John G. Krogman, Acting Director, Bureau of ATF, to the Honorable S. I. Hayakawa, United States Senate, dated July 30, 1979. A copy of the letter is attached as Exhibit "B" to the Memorandum In Support of Petition for Writ of Error Coram Nobis in United States v. Richard Boulin, United States District Court for the District of Maryland, Criminal No. HM 77-0598.

You request our comments on statements made on page 3 of the letter to the effect that a Federal firearms licensee may lawfully dispose of firearms which are held by the licensee as a private collection, and not as business inventory, without entering the transactions in licensee records required to be kept.

On reconsideration, we have determined that these statements are not accurate and do not comport with the official position taken by ATF with respect to a firearms licensee's disposition of personal firearms. Rather, ATF has adhered to the decision in United States v. Scherer, 523 F.2d 371 (7th Cir. 1975), which held, among other things, that a licensee must record the disposition of such firearms in records required to be kept by Federal firearms laws. ATF's position on this matter is illustrated in ATF P 5300.15 (5/78), a copy of which is enclosed.

This publication is routinely forwarded to new licensees and was, shortly after its adoption, provided to all licensees. You will note that it contains a sample

LODGING

firearms acquisition and disposition record with sample entries showing how various firearms transactions should be recorded. Significantly, line 9 serves to inform the licensed dealer of the requirement to enter in his records the acquisition and disposition of his personal firearm and the manner in which it should be done.

At an appropriate time in the near future, we will again inform all Federal firearms licensees of the record-keeping requirements pertaining to the acquisition and disposition of their personal firearms, as well as seek to correct any inaccurate statements ATF has made about this subject matter.

Sincerely yours,

G. R. Dickerson

Director

Enclosure

Federal Firearms Licensee Information

Department of the Treasury
Bureau of Alcohol, Tobacco and Firearms

P 5300.15 (5/78)

Department of the Treasury
Bureau of Alcohol, Tobacco and Firearms
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Treas 564

U.S. MAIL

THE FOLLOWING INFORMATION RELATES TO DEALING IN FIREARMS AND AMMUNITION. THERE IS ALSO A SECTION RELATING TO THE COLLECTION OF CURIO AND RELIC FIREARMS AND AMMUNITION. THE APPROPRIATE REFERENCES ARE TITLE 27, CODE OF FEDERAL REGULATIONS, PART 178, AND ALL PAGE REFERENCES ARE TO ATF PUBLICATION 5300.5, YOUR GUIDE TO FIREARMS REGULATION.

THESE ARE GENERAL GUIDELINES, INTENDED FOR QUICK REFERENCE AND DO NOT COVER ALL SITUATIONS THAT YOU, AS A LICENSEE, MAY ENCOUNTER. CONSULT THE LAW AND REGULATIONS OR CONTACT ATF FOR MORE DETAILED INFORMATION. ATF FIELD AND REGIONAL OFFICES ARE LISTED IN ATF P 5300.5, BEGINNING WITH PAGE 119.

A FEDERAL FIREARMS LICENSE DOES NOT ALLOW YOU TO CONDUCT BUSINESS IN A MANNER CONTRARY TO STATE OR LOCAL FIREARMS LAWS, SUCH AS THOSE THAT REQUIRE LICENSES OR RESTRICT FIREARMS TRANSFERS AND RECEIPTS.

Your License

1. It is in effect until the expiration date shown on the license (178.49) (page 39).
2. It covers operations only at the location shown on the license (178.50) (page 39). See special requirements for collectors elsewhere in this publication.
3. You should examine your license carefully to make sure the information shown is correct.
4. If you find an error, send the license back to your regional regulatory administrator for correction (178.48) (page 39).
5. You must keep your license (ATF Form 8 Part I) posted and ready for inspection by ATF officers.
6. Use the copy of the license (Part II) to make purchases. You may make copies, but each copy must have your original signature (178.94, 178.95) (page 43).

Renewal of Your License

1. ATF will send a renewal application to you about 60 days before the expiration date shown on your license.
2. If you have not received your renewal application 30 days before the license expiration date, and you want to stay in business, please notify the ATF regional office serving your State (see ATF P 5300.5, pages 119-120).
3. If you want to renew your license, you must complete and send the application, with the fee attached, to your Internal Revenue Service Center before the license expiration date. If you file before the license expiration date, you may operate until you receive your new license. See questions and answers under the subheadings "Licensing" and "Conduct of Business – Licensees" in ATF P 5300.5 for more detailed information.

Records You Must Keep

Firearms

1. Keep a separate permanent record (see definition of "bound book," page 82) of all firearms received and disposed of. This includes firearms received in pawn, curios and relics, and firearms received for overnight (or longer) repair.
   a. Firearms are to be logged in when received and logged out as they are disposed of (178.125(c)) (page 52). This publication contains sample bound book entries showing some types of firearms transactions, including both acquisitions and dispositions.
   b. Keep these records permanently.
2. Prepare ATF Form 4473, Firearms Transaction Record, covering the transfer of each firearm to a nonlicensed person. Read the Form 4473 carefully as it is the most important record you will keep.
   a. These completed Forms 4473 must also be kept permanently, in addition to the permanent record described above.
   b. Forms 4473 may be kept alphabetically (by name of purchaser), chronologically (by date) of disposition, or numerically (by transaction serial number (178.124) (page 50).
   c. Use yellow Form 4473 (Part I) for over-the-counter sales; use green Form 4473 (Part II) for either contiguous (bordering) State sales or non-over-the-counter sales (178.124) (page 50).

Acquisition of Ammunition

3. Keep a separate record of all ammunition received.
   a. Invoices filed in an orderly manner are acceptable, if they are kept separate from other commercial records.
   b. Keep these records for 2 years.

Disposition of Ammunition

4. You do not have to keep a record of the disposition of shotgun ammunition, ammunition used only in rifles, or component parts of these types of ammunition.
5. You must, however, keep a separate, permanent record (see definition of "bound book," page 84) of the disposition of handgun ammunition or ammunition that is interchangeable between handguns and rifles, such as .22 caliber (178.125(c)) (page 51) (also page 91). This publication contains sample bound book entries showing several ammunition transactions.
   a. Invoices may not be used for this permanent record.
   b. Keep these records for 2 years.

Transfers Between Licensees

1. Generally, licensees may freely buy and sell firearms and ammunition among themselves.
   a. Licensees do not have to prepare Forms 4473 on transfers to other licensees.
   b. Transactions between licensees must be recorded in the bound book record.
   c. The licensee to receive the firearms or ammunition shall furnish a copy of his license (ATF Form 8 Part II, or copy) to the licensee selling or otherwise disposing of the firearms or ammunition, prior to making the transaction (178.94, 178.95) (page 43).
   d. Licensees may ship interstate to other licensees.
   e. As a firearms dealer, you may take orders for firearms and ammunition at any location, but THE ORDERS MUST BE FILLED ONLY AT YOUR LICENSED PREMISES (see questions and answers, page 83).
2. Your particular license may limit your activity. (See heading for LICENSED COLLECTORS in this publication and questions and answers on page 83).

Know Your Customer

1. Identify the buyer by name, age and residence address before delivering any firearm or ammunition (178.124, 178.125) (pages 50-52) (also page 1).

Age Requirements

2. Under Federal law, the minimum age for purchasers of firearms and ammunition may be either 18 or 21 years, depending on the item being purchased.
   a. You may not sell a handgun or handgun ammunition to persons under 21 years of age.
   b. You may not sell shotguns or rifles, or shotgun and rifle ammunition to persons under 18 years of age.
   c. You may sell ammunition that is interchangeable between rifles and handguns to a purchaser who is at least 18 years of age if you are satisfied that he or she will use the ammunition in a rifle (178.99, page 45, and questions and answers, page 83).

Residency Requirements for Nonlicensee Sales

1. If you sell or deliver a handgun to a nonlicensed person, that person must be a resident of the State in which your licensed premises is located (178.99) (page 45).
2. If you sell or deliver a rifle or shotgun to a nonlicensed person, that person must be:
   a. a resident of the State in which your business premises is located; or
   b. a resident of a contiguous (bordering) State, if:
      (1) the buyer's State has enacted legislation allowing such sale or delivery (pages 126 and 127);
      (2) the sale conforms to legal requirements in both States;
      (3) the appropriate law enforcement officer in the buyer's home State has been notified as required; and
      (4) the waiting period requirement has been satisfied (178.96-178.99) (pages 44 and 45).

Prohibited Sales

1. In addition to the requirements shown above, you may not lawfully sell or dispose of any firearm or ammunition to certain types of persons; e.g., convicted felons. See ATF F 4473, questions 8a through 8h.
2. If any of your customers would violate any State law or local ordinance that applies at the place where you sell or deliver, by purchasing or possessing any firearm or ammunition, then, under Federal law, you may not lawfully sell or deliver any firearms or ammunition to that customer (Federal law, (922(b)(2)) (page 5).

Lost or Stolen Firearms

If firearms are lost or stolen, you should immediately contact your local law enforcement authorities.

Report Multiple Handgun Sales

1. The delivery of more than one handgun to the same individual (nonlicensee) within 5 consecutive business days must be reported to ATF on ATF F 3310.4, Report of Multiple Sale or Other Disposition of Pistols and Revolvers, (178.126a, page 53; see also page 1).
2. The original of Form 3310.4 must be mailed to the ATF Criminal Enforcement office for your area at the end of the business day that the sale occurs. A list of these offices and their addresses appears on page 123.

Licensed Collectors

(See "Collectors," page 83 and "Operations by Federally Licensed Collectors," page 95)

1. You may buy curios and relics from any source (178.50) (page 39).
2. You may dispose of curios and relics to another licensee anywhere or to nonlicensed residents in your State (178.50) (page 39).
3. You must maintain the same records as other licensees.
4. Your collector's license entitles you to conduct transactions in curios and relics only. A licensed collector has the same status as a nonlicensee in any transactions involving firearms and ammunition other than curios and relics.

Change of Address

You must notify your regional regulatory administrator at least 10 days before moving your firearms or ammunition business to a new address (178.52) (page 40).

Sale of Business or Going Out of Business

1. Within 30 days after you sell or discontinue your firearms or ammunition business, you must give written notice of this change in status to your regional regulatory administrator (178.57) (page 40).
2. If you sell or discontinue your firearms or ammunition business and are succeeded by a new licensee, your firearm dealer records should be marked to show this fact and shall be delivered to the successor (178.127) (page 53).
3. You must deliver all of your firearms records to your ATF regional regulatory administrator within 30 days of going completely out of the firearms or ammunition business (178.127) (page 53).

Questions

If you should have any questions regarding Federal laws or regulations and are unable to locate the answers in ATF P 5300.5 (see page 79), please contact your nearest ATF field office listed on pages 120-125, or your ATF regional office listed on pages 119-120.

AN ATF OFFICER WILL EXAMINE YOUR BUSINESS OPERATIONS PERIODICALLY.

COMPLIANCE WITH FEDERAL LAW AND REGULATIONS IS IMPORTANT–VIOLATIONS CAN RESULT IN THE LOSS OF YOUR LICENSE OR OTHER SERIOUS CONSEQUENCES.

Sales of Firearms to Law Enforcement Officers

Section 925(a)(1) of the Gun Control Act exempts law enforcement agencies from the transportation, shipment, receipt, or importation controls of the Act when firearms are to be used for the official business of the agency.

If a law enforcement officer is issued a certification letter on the agency's letterhead signed by a person in authority within his agency stating that the officer will use the firearms in performance of his official duties, then that officer specified in the certification may purchase a firearm from you regardless of the State in which he resides or in which the agency is located. The seller is not required to prepare a Form 4473 covering such a sale, however, the transaction must be entered in the permanent record. The certification letter from the officer must be kept in your files.

The Bureau considers the following as persons having authority to make certifications that the law enforcement officer purchasing the firearms will use the firearms in performance of his official duties.

1. In a city or county police department, the director of public safety or the chief or commissioner of police.
2. In a sheriff's office, the sheriff.
3. In a State police or highway patrol department, the superintendent or the supervisor in charge of the office to which the State officer or employee is assigned.
4. In Federal law enforcement offices, the supervisor in charge of the office to which the Federal officer or employee is assigned.

The Bureau would also recognize someone signing on behalf of a person of authority provided there is a proper delegation of authority and overall responsibility has not changed in any way.

DEPARTMENT OF THE TREASURY – BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
DISPOSITION RECORD OF INTERCHANGEABLE AMMUNITION AND HANDGUN AMMUNITION

MUST BE RETAINED FOR 5 YEARS AFTER DATE OF LAST ENTRY ON PAGE

DATE 1976	MANUFACTURER	.22 CAL. RIM FIRE	OTHER: Center Fire Type of Cartridge	OTHER: No. of Rds.	PURCHASER: Name	PURCHASER: Address	PURCHASER: Date of Birth	IDENTIFICATION: Proof of age	IDENTIFICATION: Driver's License Number	IDENTIFICATION: Other Identification
12/1	WinchesTer	✓			Spencer Gatling	405 Wesley Drive Richards, Illinois	3/1/31		B100-0011-1010	
12/2	RemingTon		.25	3	Marlin Stevens	58 Sauer St. Bullard, Illinois	4/8/40	✓		
12/3	WinchesTer		.30-30	5	Guedes Reformado	44 Sharps Blvd Creedmoor, Illinois	6/7/41		C410-1000-0005	
12/4	Smith and Wetson		.30	4	Maynard Trounds	95 Peabody St. Beechardt, Illinois	12/4/58		D003-3000-0101	

For this entry, Mr. Trounds is 18 years old and the ammunition is intended for use in a rifle (178.125(c)).

SAMPLE COPY
FOR USE OF
COMMERCIAL PRINTERS

You may obtain a copy of this form, for reproduction by a commercial printer, from the ATF Distribution Center, 3800 S. Four Mile Run Drive, Arlington, Va. 22206.

Hand-ruled paper with the same column arrangement, same column headings, and the same language notations as this sample, may be used.

ATF F 5300.2 (11-73) COMMERCIAL SAMPLE

FIREARMS ACQUISITION AND

DESCRIPTION OF FIREARM					RECEIPT	
MANUFACTURER and/or IMPORTER	MODEL	SERIAL NUMBER	TYPE OF ACTION	CALIBER OR GAUGE	DATE	FROM WHOM RECEIVED (Name and Address or Name and License Number)
1) Ithaca	102 1004	6607138G	Pump	20	8/2/75	John's Fine Guns Inc FFL # 42-987
2) Smith & Wesson	10	M60512	Revolver	.38	8/4/75	Swap Shop FFL # 86-3498
3) Western Field	10504	G914G7	Pump	20	8/4/75	John's Fine Guns Inc. FFL # 42-987
4) Winchester	94	382906	Lever	.30-30	11/4/75	AL Greenfeather 928 Forrest Hill Oak, Ill. 60605
5) RemingTon	870	4932	Pump	16	6/19/76	Tom Problem 605 E. Colonial Pine Bluff, Ill 60651
6) RemingTon	540 X	312698V	single	.22	11/2/76	Joan Realator FFL # 91-3487
7) Browning	1200	38679	Auto	.45	8/24/76	John Doe 631 Pine st. Elkton, Ill. 60605
8) Western Field	10504	G914G7	Pump	20	11/24/76	Jim Michaels 829 Columbia Terrace Springfield, Ill. 60659
9) Smith & Wesson	34-1	M60562	Auto	.22	12/1/76	Brian Smith (owner) 811 Wilder Cambridge, Ill. 60721
10) RemingTon	870	4932	Pump	16	12/2/76	Fix it or Melt it Inc. FFL # 46-3988

Explanation of Acquisitions

Line

1 Shows purchase of a firearm from a licensed dealer – you must record their license number. In order for Brian to obtain this firearm, he had to submit a current copy of his FFL to John's Fine Guns (178.94). When Brian received the firearm, he entered it into this book immediately. (For variation see 178.125(f).)

4 Purchase of firearm from an unlicensed person.

5 Gun is brought in for repair. If firearm can be fixed and returned to owner on same business day, no entry need be made. However, if firearm cannot be returned that day, it must be entered as an acquisition even though it is not a purchase. Gunsmithing transactions such as this may be recorded in a separate bound book.

7 John Doe has brought in a gun for sale on consignment. Make entry on date of receipt.

8 Michaels originally purchased the gun on 11/2/76 (line 3). He does not like it and returns it on 11/24/76. The firearm must be reentered showing date of receipt and from whom received. (It was received from Michaels on 11/24/76.) The original entry on line 3 remains unchanged.

9 Brian Smith, owner of the licensed business, has a personal firearm he wants to sell. Enter firearm in book and show acquisition date as the date it was put up for sale.

10 Firearm sent to Fix It or Melt It Inc. for repair on 6/20/76 is returned to Smith's shop and reentered on 12/2/76.

Hand-ruled paper with the same column arrangement, same column headings, and the same language notations as the illustration above, may be used.

Line numbers are given for illustration purposes only.

DISPOSITION RECORD

	DISPOSITION		
	DATE	NAME	ADDRESS OR LICENSE NUMBER (If Licensee) OR FORM 4473 SERIAL NO. (If non-Licensee) [File Numerically]
1)	11/29/76	James Howse	Form 4473 #2
2)			
3)	11/2/76	Jim Michaels	Form 4473 #68
4)	9/1/76	Bill Bounce	Form 4473 #50
5)	6/20/76	Fix it or Melt it Inc.	FFL # 46-3988
6)	7/14/76	Brian Smith	Form 4473 #35
7)	7/1/77	John Doe	Form 4473 #36
8)	12/2/76	Stolen - Reported to	Police on 12/2/76
9)	12/12/76	Jake Jones, Metro Police	305 Wilkins Blvd. Atchison, Kansas 70519 See certification letter instead of F4473
10)	12/2/76	Tom Problem	605 East Colonial Pine Bluff, Ill. 60651

Explanation of Dispositions

Line

1 Sale to an unlicensed person. The buyer's name is inserted directly across from the firearm purchased. Brian's Sport Shop files Form 4473 numerically (see 178.124(b) for options) and lists the form number in place of the address. Number "2" is the serial number of the Form 4473 that Mr. House filled out.

2 This firearm has not been traded, sold, loaned, stolen or transferred out. It should be on hand and available for inspection.

4 Bounce borrows a gun. It is not a sale but it is a disposition. Form 4473 must be filled out. (See 178.97 for loans and rentals by clubs). When Bounce returns the gun, it must be shown as an acquisition.

5 Brian is unable to fix the firearm brought in by Mr. Problem and sends it to a gunsmith for repair. Gunsmiths must be licensed and Brian's Sport Shop must obtain a current certified copy of Fix It or Melt It Inc. license prior to delivery of the firearm.

6 Brian Smith, owner of the store, takes a firearm from inventory for his own personal firearm. Since this will be a personal firearm, Smith must fill out Form 4473 for himself. When this happens, it must be either removed from the business premises, or, if kept on the business premises, must be identified as not being part of his business inventory. (Such as by a tag reading "NOT FOR SALE.")

7 Gun brought in by John Doe for sale on consignment was not sold. Form 4473 must be filled out by John Doe when the gun is returned to him.

8 The firearm is stolen – show disposition of firearm as "stolen" and show date the theft was reported to the local authorities. If the police case number is available, please report it here.

9 Firearms were sold to out-of-State policeman for official use, as evidenced by certification letter. See instructions on sale to law enforcement officers.

10 Mr. Problem gets his repaired gun back. He does not need to fill out Form 4473. The gun was returned to the same person who brought the gun in for repair. If someone picked the gun up for Mr. Problem a Form 4473 would then have to be filled out by that person (178.124(a)).

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No. 83-419

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD BOULIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a licensed firearms dealer who sells "privately owned" guns away from his licensed premises is excused from the recordkeeping and reporting requirements of the Gun Control Act of 1968.

2. Whether a search warrant authorizing seizure of "firearms, ammunition and records involved in, used in or intended to be used in violation of" 18 U.S.C. 922(c) and (m) was overly broad.

3. Whether petitioner was properly convicted for conduct that was allegedly represented as lawful by officials of the Bureau of Alcohol, Tobacco, and Firearms.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Andersen v. *Maryland*, 427 U.S. 463 12

Barrett v. *United States*, 423 U.S. 212 8

Coolidge v. *New Hampshire*, 403 U.S. 443 12

Dickerson v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983) 6

Huddleston v. *United States*, 415 U.S. 814 ..... 5, 6

Kaneshiro v. *United States*, 445 F.2d 1266 9

Raley v. *Ohio*, 360 U.S. 423 13

United States v. *Abrams*, 615 F.2d 541 12

United States v. *Angelini*, 607 F.2d 1305 9

United States v. *Biswell*, 406 U.S. 311 10

United States v. *Cardwell*, 680 F.2d 75 12

United States v. *Christine*, 687 F.2d 749 13

United States v. *Cook*, 657 F.2d 730 13

Page

Cases—Continued:

United States v. *Cortellesso*, 601 F.2d 28, cert. denied, 444 U.S. 1072 13

United States v. *Currier*, 621 F.2d 7 ..... 8, 9

United States v. *Hernandez*, 662 F.2d 289 9

United States v. *Kowalski*, 502 F.2d 203, cert. denied, 420 U.S. 979 9

United States v. *Lowry*, 675 F.2d 593 11

United States v. *Masters*, 622 F.2d 83 9

United States v. *Micieli*, 594 F.2d 102 9

United States v. *Miller*, 644 F.2d 1241, cert. denied, 454 U.S. 850 9

United States v. *Perkins*, 633 F.2d 856 9

United States v. *Powell*, 513 F.2d 1249, cert. denied, 423 U.S. 853 9

United States v. *Ruisi*, 460 F.2d 153, cert. denied, 409 U.S. 914 7

United States v. *Scherer*, 523 F.2d 371, cert. denied, 424 U.S. 911 ..... 8, 9

United States v. *Smith*, 686 F.2d 234 13

United States v. *Swinton*, 521 F.2d 1255, cert. denied, 424 U.S. 918 9

United States v. *Tarr*, 589 F.2d 55 9

United States v. *Ventresco*, 380 U.S. 102 12

United States v. *Williams*, 502 F.2d 581 9

Page

Constitution, statutes, rules and regulations:

U.S. Const. Amend. IV 11

Gun Control Act of 1968, 18 U.S.C. 921 *et seq.* 4

18 U.S.C. 922 ..... 7, 8

18 U.S.C. 922(a) 7

18 U.S.C. 922(c) 2, 4, 5, 6, 7, 9-10, 11

18 U.S.C. 922(m) 2, 5, 8, 10, 11

18 U.S.C. 923 ..... 8, 10

18 U.S.C. 923(g) 10

Fed. R. Crim. P. :

Rule 7(c)(3) 7, 11

Rule 12 3

Rule 41(e) 3

27 C.F.R. :

Section 178.124 10
Section 178.124(a) 11
Section 178.124(c) 11
Section 178.124(f) 11
Section 178.125 2
Section 178.50 6

Miscellaneous:

48 Fed. Reg. 44088 (1983) 7

S. Rep. 1097, 90th Cong., 2d Sess. (1968) 5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not reported. The memoranda and orders of the district court (Pet. App. 13a-17a, 23a-26a, 27a-35a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1983. A petition for rehearing was denied on July 15, 1983 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on September 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial on stipulated facts (Pet. App. 36a-41a) in the United States District Court for the District of Maryland, petitioner was convicted on 10 counts charging failure of a federally licensed firearms dealer to maintain records

relating to five firearms transactions, in violation of 18 U.S.C. 922(c) and (m) (Pet. App. 22a-26a). Petitioner was sentenced to concurrent terms of one year's imprisonment, of which all but one month was suspended in favor of probation, and was fined $500. Petitioner subsequently filed a petition for a writ of error coram nobis, seeking vacation of his conviction. The district court denied the petition (*id.* at 13a-17a). Petitioner appealed from both his conviction and the denial of the coram nobis petition. The court of appeals affirmed (*id.* at 1a-10a), with one judge dissenting.

1. Petitioner, a former Maryland police officer, was a firearms dealer federally licensed to conduct his commerical business at a specific address in Silver Spring, Maryland (Pet. App. 23a, 36a-37a). As a licensed firearms dealer, petitioner was required to maintain a firearms record book (27 C.F.R. 178.125). Petitioner also maintained a separate log for weapons designated as his personal collection.

In September, October, and November 1977 petitioner set up tables at three gun shows in Maryland. On each occasion he sold firearms to Gordon Schoen, an unlicensed individual acting as an undercover agent for the Bureau of Alcohol, Tobacco, and Firearms (ATF).

On September 25, 1977, petitioner sold three semi-automatic firearms to Schoen without recording the sales on state or federal firearms transfer forms (Pet. App. 37a-38a). Petitioner recorded two of these sales in his personal weapons log but failed to record the sale of the third weapon (*id.* at 2a). None of these weapons was recorded in his dealer's firearm record book (*id.* at 37a).

Several days later, on October 1, 1977, petitioner sold a .357 magnum revolver to Schoen. The gun was not included in petitioner's records, and petitioner did not complete any of the required forms for its transfer (Pet. App. 2a, 37a-

38a).[1] Later that month, in a consensually recorded conversation, petitioner and Schoen discussed the sale of other firearms, including a Colt Python revolver. Petitioner agreed that future sales would be "off paper," that is, not recorded (*id.* at 72a), and on November 5 petitioner sold Schoen a Colt Python .357 magnum revolver at a gun show (*id.* at 38a). The handgun was not entered in petitioner's books, and he did not complete any federal or state transfer forms (*id.* at 2a, 38a).

On December 6, 1977, in another consensually recorded telephone conversation (Pet. App. 74a-82a), petitioner and Schoen discussed the sale of other guns. Petitioner agreed that the sales would be "like we did them before" (*id.* at 75a), that is, unrecorded. Before these sales were consummated, however, federal agents arrested petitioner and, a week later, executed a search warrant on his residence. Pursuant to the warrant, ATF agents seized 34 long guns, 49 handguns, 5,765 rounds of ammunition, and various records. Included among the seized weapons were the firearms mentioned in petitioner's December 6 telephone conversation (C.A. Br. 7).

2. After his arrest, petitioner filed a motion for the return and the suppression of the evidence seized during the execution of the search warrant. Fed. R. Crim. P. 41(e) and 12. At a hearing on his motion, petitioner testified that an unidentified ATF agent had assured him that he was not required to record private gun transactions relating to weapons he acquired away from his business premises without the use of his firearms license (Pet. App. 69a). The district court denied the motions (*id.* at 35a).

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[1]Petitioner also sold Schoen two other handguns on October 1. Because the proper transfer forms were filled out for these handguns, the government dismissed the three counts of the indictment relating to these sales (Pet. 2 n.1; Pet. App. 36a-41a).

Following his conviction, in a petition for a writ of error coram nobis, petitioner renewed the defense that he had been erroneously advised by the ATF that his "private" sales were legal. Petitioner cited a July 30, 1979, letter by John Krogman, then acting Director of the ATF, which stated that a licensee's disposition of personal firearms need not be recorded in the licensee's business records (Pet. App. 56a-61a). The district court, noting that petitioner had properly recorded some "personal" sales, rejected petitioner's assertion that he had relied on erroneous ATF advice (*id.* at 15a), and similarly dismissed the Krogman letter, observing that the present Director of ATF had disavowed the conclusion set forth in the letter (*ibid.*).

3. On appeal from petitioner's conviction and the denial of his coram nobis petition, the court of appeals affirmed (Pet. App. 1a-10a). The court first found that, under federal law, all of petitioner's firearms transactions were subject to the recording requirements of the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, irrespective of whether the firearms came from petitioner's personal or business collection (Pet. App. 5a-6a). The court also found that, by selling weapons at a location other than his licensed business address without complying with the reporting requirements of the Act, petitioner violated 18 U.S.C. 922(c) (Pet. App. 6a). The court then affirmed the district court's denial of the petition for a writ of error coram nobis, agreeing with the district court that petitioner did not in fact rely on erroneous ATF advice (*id.* at 6a). Turning to petitioner's challenge to the search warrant and seizure of his cache of personal weapons, the court rejected his claims that the warrant was unsupported by probable cause and that it did not describe with sufficient particularity the items to be seized (*id.* at 7a-8a).

ARGUMENT

It is undisputed that petitioner sold five guns to Schoen without submitting the appropriate forms to ATF or maintaining the proper records relating to the transfers. Petitioner, contends, however, that he was erroneously indicted under Sections 922(c) and (m) of the Gun Control Act of 1968, that the search warrant in this case was invalid, and that the government should have been held estopped from bringing this prosecution because of his alleged reliance upon the advice of an unidentified ATF agent. None of these contentions merits review by this Court.

1(a). Petitioner initially contends (Pet. 11-16) that he was improperly indicted under 18 U.S.C. 922(c). That Section, set forth at Pet. vii-viii, "allows a licensed gun dealer to sell a weapon to a person who does not appear at his business premises if various reports are made" (Pet. App. 6a). Petitioner, a licensed gun dealer, sold five weapons to Schoen, who did not appear in person at petitioner's licensed place of business, without making the reports required by Section 922(c). Hence, petitioner's conduct came within the plain language of the statute and "[h]e therefore properly was indicted under this section" (Pet. App. 6a).

When Congress enacted the 1968 gun control legislation, "it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974). Congress concluded that "the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States" (*ibid.*). (Citing S. Rep. 1097, 90th Cong., 2d Sess. 108 (1968)). The 1968 gun control legislation is clearly "aimed at restricting public access to firearms." *Huddleston*, 415 U.S. at 824.

As this Court has previously recognized, the "principal agent of federal [gun control] enforcement is the dealer." *Huddleston*, 415 U.S. at 824. He is required to keep records of the sale and disposition of firearms (*ibid.*). All commerce in ammunition and firearms is channeled through federally licensed dealers, "the focus of the federal scheme," in order "to eliminate the mail order and the generally widespread commerce in [firearms], and to insure that, in the course of sales or other dispositons by these dealers, weapons [will] not be obtained by individuals whose possession of them would be contrary to the public interest" (*id.* at 825; *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 5). To permit a licensed dealer to avoid the reporting requirements of the statute would defeat its underlying purpose.

Petitioner's contrary claim is predicated upon 27 C.F.R. 178.50, which requires a licensed dealer to obtain "a separate license * * * for each location at which a firearms or ammunition business * * * is conducted." On the basis of that regulation, petitioner argues that he was licensed to sell firearms only at his place of business, and that when he sold the firearms at the gun fair he was not a "licensed dealer" under Section 922(c). This contention, the rationale of which would essentially repeal the reporting requirement of Section 922(c), ignores the reality of petitioner's course of dealing in this case. Petitioner was a licensed dealer at all times relevant to this case; that he may have acted wrongfully as a licensee in transferring firearms away from his place of business does not alter his legal position, but merely shows that he failed to comply with the federal regulation that he not transfer possession of firearms in non-over-the

counter sales without satisfying the reporting requirements of 18 U.S.C. 922(c).[2]

In any event, in a pending rulemaking proceeding, ATF has proposed altering its regulations to permit a licensed dealer to sell firearms at a gun show within the same state as the dealer's licensed premises. Notice of Proposed Rulemaking No. 487, 48 Fed. Reg. 44088 (1983). This rulemaking proceeding will put to rest petitioner's claim that a dealer selling weapons at a gun show is "unlicensed," thereby depriving the issue raised by petitioner of any future practical importance.[3]

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[2]"[Y]our 1977 guide to Firearms Regulation," excerpted in part by petitioner (Pet. xiii-xiv), explains that a licensed dealer may sell firearms and ammunition at a gun show so long as he merely takes orders at that location and fills them at his licensed premises or through the mail (Pet. xiii).

[3]Although *United States* v. *Ruisi*, 460 F.2d 153 (2d Cir.), cert. denied, 409 U.S. 914 (1972), cited by petitioner (Pet. 12-14), appears to conflict with this analysis, any possible conflict does not merit the attention of this Court. In that case, as in the instant one, licensed dealers sold firearms at a gun show. Rather than being charged under 18 U.S.C. 922(c), however, they were charged with engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a). The defendants did not challenge their conviction under Section 922(a) on the ground that they were licensed, and the court of appeals assumed the propriety of the charge under those facts. Therefore, any conflict between *Ruisi* and this case is at most over which of two subsections of Section 922 was violated by petitioner's course of conduct; there is no conflict over whether the conduct is illegal — both *Ruisi* and the instant case would hold that petitioner had violated the Gun Control Act of 1968. See Fed. R. Crim. P. 7(c)(3) (error in citation of statute not ground for reversal of conviction unless prejudicial). Nor does the possible conflict between *Ruisi* and this case appear to be recurring. We are not aware of any subsequent reported decision which holds that a licensed dealer is unlicensed when he makes sales off his licensed premises. Finally, as noted above, the future significance of any discrepancy between *Ruisi* and this case is slight, due to the pending ATF rulemaking that will clarify that dealers making sales at gun shows are "licensed" under the Gun Control Act of 1968. 48 Fed. Reg. 44088 (1983).

b. Petitioner next contends (Pet. 16-20) that the record-keeping requirements of 18 U.S.C. 922(m) do not apply to personally owned firearms transferred by a licensed dealer. Petitioner accordingly argues that, because the five charged weapons in this case were allegedly owned in his "private capacity" (Pet. 17), he was not required to record their sales or to make the proper forms available for inspection by ATF. This argument is without legal or factual merit.

Petitioner's attempt to circumvent the statutory reporting requirements for licensed dealers by separating "business" from "personal" transactions is contrary both to case law and to the clear intent of Congress. *United States* v. *Scherer*, 523 F.2d 371 (7th Cir. 1975), cert. denied, 424 U.S. 911 (1976); *United States* v. *Currier*, 621 F.2d 7 (1st Cir. 1980). As the district court found (Pet. App. 31a-32a):

> [P]ersons who sell guns with sufficient frequency to be characterized as dealers do not have the option which defendant assumes exists to operate with or without a license. The statute requires that they be licensed and adhere to the restrictions established for the operation of a dealership. Therefore, the application of the record-keeping provisions to sales of weapons from a personal collection does not in any way discourage persons from becoming licensed dealers.
>
> * * * * *
>
> A review of the statute establishes that the legislature intended the record-keeping provisions to apply to sales of weapons from a dealer's personal collection. First, the regulations promulgated pursuant to Sections 922 and 923(g) refer to the sale of "any firearm." Also, to achieve the purpose of the Gun Control Act, the record-keeping provisions must be applied to sales from personal collections. In *Barrett* v. *United States*, 423 U.S. 212 (1976), the Court explained that the act

was designed to prevent firearms from coming into the hands of the unqualified. If licensed dealers could avoid maintaining records by simply designating guns as belonging to a personal collection rather than a business inventory or by selling the guns from their residences rather than their place of business, the effectiveness of recording gun sales to monitor who receives the firearms would be destroyed.

Moreover, on the facts of his case, there is no reason to reach petitioner's claim that the decision below and the decisions in *United States* v. *Scherer, supra,* and *United States* v. *Currier, supra,* deprive him of the right afforded non-licensed persons to trade in privately owned firearms. In this case, petitioner engaged in a series of "off record" sales and proposed to engage in numerous similar transactions in the future. Had he not been a licensed dealer, his course of conduct would have subjected him to prosecution for dealing in weapons without a license.[4] Accordingly, he was not deprived of any "right" to be free from criminal

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[4]See, *e.g., United States* v. *Perkins,* 633 F.2d 856, 860 (8th Cir. 1981) (three transactions involving eight guns); *United States* v. *Tarr,* 589 F.2d 55, 59 (1st Cir. 1978) (" 'dealing' connotes a regular course of conduct carried on over a period of time or, at least, on more than one or two unrelated occasions"); *United States* v. *Powell,* 513 F.2d 1249, 1250 (8th Cir.), cert. denied, 423 U.S. 853 (1975) (six guns); *United States* v. *Williams,* 502 F.2d 581, 582-583 (8th Cir. 1974) (five transactions); *United States* v. *Kowalski,* 502 F.2d 203, 205 (7th Cir. 1974), cert. denied, 420 U.S. 979 (1975) (three sales). See also *United States* v. *Hernandez,* 662 F.2d 289, 291 (5th Cir. 1981); *United States* v. *Miller,* 644 F.2d 1241, 1245 (8th Cir.), cert. denied, 454 U.S. 850 (1981); *United States* v. *Masters,* 622 F.2d 83, 88 (4th Cir. 1980) (citing cases); *United States* v. *Angelini,* 607 F.2d 1305, 1307 (9th Cir. 1979); *United States* v. *Micieli,* 594 F.2d 102, 108 (5th Cir. 1979); *United States* v. *Swinton,* 521 F.2d 1255, 1258-1259 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976); *Kaneshiro* v. *United States,* 445 F.2d 1266, 1269-1270 (9th Cir. 1971).

prosecution by the imposition of a recordkeeping requirement on his allegedly "personal" transactions.[5]

c. Petitioner also asserts (Pet. 13) that he cannot simultaneously be convicted of failure to comply with the reporting requirements for sale to an individual who does not appear at his licensed place of business, as set out in 18 U.S.C. 922(c), and failure to maintain the records required of licensed dealers, as specified by 18 U.S.C. 922(m).[6] Petitioner argues that the Section 922(c) counts charge him with failing to file Form 4473, Part II (Pet. App. 65a), which is to be completed for non-over-the-counter or mail-order sales, and that the Section 922(m) counts contrarily charge a failure to file Form 4473, Part I (Pet. App. 63a), which is to be completed for on-the-premises sales. This contention is incorrect.[7]

It is true that, had petitioner complied with Section 922(c), he would have directed the buyer to complete Form 4473 for each transaction and would have submitted Part II of the form — for non-over-the-counter sales — to the appropriate law enforcement office. However, the record maintenance and filing requirements of 18 U.S.C. 922(m)

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[5]Even if petitioner's licensed status deprived him of a right he would otherwise have to dispose of personally owned firearms without recording the disposition, there is no constitutional infirmity in the deprivation. See *United States* v. *Biswell*, 406 U.S. 311 (1972).

[6]18 U.S.C. 922(m) makes it unlawful for a licensed dealer "to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder." Section 923(g) requires a licensed dealer to "maintain such records of * * * sale, or other disposition, of firearms * * * as the Secretary may by regulations prescribe." The particular record that petitioner is charged with failing to maintain in the Section 922(m) counts is Form 4473, the official Report of Firearms Transaction form, required by 27 C.F.R. 178.124.

[7]It is also of no practical consequence in light of petitioner's concurrent sentences.

relate to Form 4473 as a whole, with no distinction between over-the-counter and non-over-the counter sales. In short, Section 922(c) and (m) are not mutually exclusive, as petitioner urges.[8]

2. Contrary to petitioner's claims (Pet. 20-21), the search warrant and affidavit in this case (Pet. App. 49a-55a) were not overly broad or vague. The warrant authorized seizure of "firearms, ammunition and records involved in, used in or intended to be used in violation of Title [18] U.S.C. Section 922(m) and 922(c)" (Pet. App. 49a). The courts below properly found the warrant to be within the " 'margin of flexibility' " permitted under the Fourth Amendment (Pet. App. 8a) (quoting *United States* v. *Lowry*, 675 F.2d 593, 595 (4th Cir. 1982)). See also Pet. App. 43a-45a.

The warrant and the accompanying affidavit made it clear that the focus of the search was petitioner's "personal" collection of firearms and ammunition stored in his residence, as well as the records relating to unreported transactions involving these weapons. Had the warrant not used

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[8]Petitioner's sole support for the contention that the Section 922(c) counts and Section 922(m) counts are mutually exclusive lies in a miscitation contained in the string cites at the bottom of each Section 922(m) count. Counts eight through twelve of the indictment (Pet. App. 45a-48a) charge petitioner with failing to keep records, in violation of 18 U.S.C. 923 and 27 C.F.R. 178.124(a). The string citation at the bottom of each count, however, cites 27 C.F.R. 178.124(c) in addition to 27 C.F.R. 178.124(a). Section 178.124(a) relates to Form 4473 as a whole, while Section 178.124(c) relates to the recordkeeping requirements for over-the-counter sales. Any ambiguity created by this oversight was never challenged directly by petitioner, nor is it material in this case. Petitioner was not misled by the miscitation, so any conceivable error was harmless. Fed. R. Crim. P. 7(c)(3). Moreover, in its memorandum explaining the basis upon which it convicted petitioner, the district court relied on 27 C.F.R. 178.124(a) and (f) (Pet. App. 24a-25a), and Section 178.124(f) relates to non-over-the-counter sales. Thus, the court's order made clear that it consistently regarded petitioner's conduct to be in violation of regulations directed at non-over-the-counter sales.

the shorthand reference to Sections 922(c) and (m), but spelled out instead that the search was to focus on evidence of suspected activity involving unrecorded "personal" firearms sales, petitioner's constitutional complaint would be palpably meritless.

The search warrant in *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982), cited by petitioner (Pet. 20), authorized a search for and seizure of all records or other evidence of violation of the general tax evasion statute. In that case, and others cited therein, the executing officers were required " 'to make a legal distinction between fraudulent records and records that are not fraudulent, which they were not qualified to do.' " 680 F.2d at 78 (quoting *United States* v. *Abrams*, 615 F.2d 541, 542 n.2 (1st Cir. 1980)). Here, in contrast, it was not necessary that the executing agents carefully peruse petitioner's records to distinguish between evidentiary and non-evidentiary material. The records to be seized under the terms of the warrant were limited to evidence of the violation of two subsections of the firearms statute, and the warrant and accompanying affidavit focused the search on evidence relating to the sale of "personal" firearms without proper documentation. See *Andresen* v. *Maryland*, 427 U.S. 463 (1976). Thus, the warrant, when viewed in a "a commonsense and realistic fashion" (see *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)), was sufficiently particular to prevent "a general, exploratory rummaging in a person's belongings" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971)) and both inform the magistrate and instruct the executing officers on the particular items to be seized.[9]

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[9]A warrant need not describe the documents and evidence sought with surgical precision when the investigating agents have no way of knowing precisely what form those records might take. Because a more precise description was not feasible in these circumstances, the general description of "records involved in, used in and intended to be used in"

3. Finally, petitioner contends (Pet. 21-22) that he was convicted "for exercising a privilege which the State had clearly told him was available to him." *Raley* v. *Ohio*, 360 U.S. 423, 426 (1959). The courts below correctly rejected this claim (Pet. App. 6a, 14a-15a).

Petitioner asserts (Pet. 22 n. 16) that he relied upon the ATF "[Y]our 1977 guide to Firearms Regulation" (Pet. xiii-xiv) in undertaking the five sales at issue here. The guide, however, makes it clear that a licensee — such as petitioner[10] — must execute a Form 4473 each time he sells a firearm, and that at a gun show he can display and take orders but may not transfer firearms directly. In short, the 1977 guide, when read properly and as a whole, clarified that petitioner, as a licensed dealer, could not regularly and repeatedly engage in the sale of allegedly privately owned firearms at gun shows in circumvention of the statute.

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violations of the record-keeping provisions of the Gun Control Act of 1968 was acceptable. See *United States* v. *Christine*, 687 F.2d 749, 760 (3d Cir. 1982); *United States* v. *Smith*, 686 F.2d 234, 238 (5th Cir. 1982); *United States* v. *Cook*, 657 F. 2d 730, 733 (5th Cir. 1981); *United States* v. *Cortellesso*, 601 F.2d 28, 32 (1st Cir. 1979), cert. denied, 444 U.S. 1072 (1980).

[10]Petitioner maintains (Pet. 22 n.16) that at the gun shows he was a nonlicensee. Question and answer No. 59 in the 1977 firearms regulation guide (Pet. xiii) put petitioner on notice that he was still a licensee, despite the absence of a specific license to sell guns at the gun shows. The "Krogman" letter (Pet. App. 56a-61a), to which petitioner also refers, explains as well that a licensed firearm dealer may only accept orders at gun shows (*id.* at 58a). To the extent that the letter contains statements supportive of petitioner's position, we note that those statements have been disavowed by the Department of the Treasury (*id.* at 15a n.2) and the Krogman letter itself was written after petitioner's convictions and could not have been relied upon by petitioner when he committed the charged offenses.

Petitioner's related argument that he relied upon the opinion of an unidentified ATF agent was rejected by both the district court and the court of appeals (Pet. App. 6a, 14a-15a). Their conclusion that petitioner did not in fact rely upon the advice allegedly given him merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD BOULIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Page
Table of Authorities	i
Argument	1
Conclusion	10

TABLE OF AUTHORITIES

Cases:

United States v. Ruisi, 460 F.2d 153	4, 6
Huddleston v. United States, 415 U.S. 814	2

Statutes:

18 U.S.C. 922	4
18 U.S.C. 922(a)	4, 5, 6, 7
18 U.S.C. 922(c)	1, 2, 4, 5, 6, 7, 8
18 U.S.C. 922(m)	8
18 U.S.C. 923	4, 6, 8
18 U.S.C. 923(g)	8
18 U.S.C. 924(a)	8
18 U.S.C. 1715	ii, 3

Regulations and Rulings:

27 C.F.R. 178.96	2, 7
27 C.F.R. 178.96(b)	2
27 C.F.R. 178.96(c)	2
27 C.F.R. 178.124(a)	6, 8
27 C.F.R. 178.124(c)	6, 7, 8
Your 1977 guide to—FIREARMS REGULATION	5, 6, 9, 10
Revenue Ruling 69-59	4

ADDITIONAL STATUTE INVOLVED

18 U.S.C. 1715. Firearms as nonmailable; regulations

Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe, for use in connection with their official duty, to officers of the Army, Navy, Air Force, Coast Guard, Marine Corps, or Organized Reserve Corps; to officers of the National Guard or Militia of a State, Territory, or District; to officers of the United States or of a State, Territory, or District whose official duty is to serve warrants of arrest or commitments; to employees of the Postal Service; to officers and employees of enforcement agencies of the United States; and to watchmen engaged in guarding the property of the United States, a State, Territory, or District. Such articles also may be conveyed in the mails to manufacturers of firearms or bona fide dealers therein in customary trade shipments, including such articles for repairs or replacement of parts from one to the other, under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any pistol, revolver, or firearm declared nonmailable by this section, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

1. Respondent disputes Petitioner's contention that he was improperly indicted under 18 U.S.C. 922(c) (Opp. 5), thereby reflecting a basic misunderstanding of section 922(c). Respondent's position that a licensed federal firearms dealer may make non-over-the-counter sales *away from* the premises specified in his license, provided he performs the reporting procedures in section 922(c), is clearly erroneous and refuted by Form 4473 and the accompanying instructions provided to licensed firearms dealers by the Bureau of Alcohol, Tobacco and Firearms (ATF) to enable compliance with 18 U.S.C. 922(c). (App. N, 65a) In Part II of Form 4473, a "Non-over-the-Counter Transaction" is defined on page 2, (App. N, 66a) as "A *mail order* transaction to the resident of the State in which the transferor's (seller's) premises are located." (emphasis added). In other words, the only "Non-over-the-Counter Transaction" permitted by 18 U.S.C. 922(c) is a mail order sale, which must be made by a licensed dealer from his business premises. There exists no form designed to be completed by a licensed dealer who transfers a firearm at any place *away*

from his business premises, since the Gun Control Act of 1968 does not permit a licensed dealer to make such a transfer.

27 C.F.R. 178.96 (Pet. xi), which implements 18 U.S.C. 922(c) by prescribing the procedures to be followed by a dealer when he makes a mail order sale, is clearly captioned *"Out-of-State and mail order sales."* Section 178.96(b) covers mail order sales, and section 178.96(c), not relevant here, prescribes the conditions under which a sale may be made by a licensed dealer at his business premises to a non-licensed resident of a contiguous state. It, nonetheless, appears that Respondent, by quoting from *Huddleston v. United States*, 415 U.S. 814 (1974) (Opp. 5-6), may be attempting to suggest that the Gun Control Act prohibits mail order sales (Opp. 5-6). On the contrary, as Part II of Form 4473 evidences, under certain circumstances, such sales may be made. Thus, ATF has created a special form and issued a specific regulation to ensure that such sales are recorded as such. What the Gun Control Act does prohibit, as has been thoroughly explained in the Petition (Pet. 11-16), is off-premises or itinerant dealing in firearms by a licensed federal firearms dealer.

It is, therefore, very much in dispute, contrary to the opening sentence of Respondent's argument, whether Petitioner, when he transferred five guns to Gordon Schoen away from his business premises, was guilty of a failure to submit forms or maintain records. There is no evidence to indicate that Schoen placed a mail order with Petitioner and that the latter shipped the firearm without completing Part II of Form 4473. The plain language of 18 U.S.C. 922(c) (Pet. vii) permitting a licensed dealer to sell to a person "who does not appear in person at the licensee's business premises" clearly refers to a person who mails his order, rather than coming in-person to the dealer's premises.

Respondent's erroneous contention that Petitioner could properly have conducted business as a firearms dealer at a gun show, provided Part II of Form 4473 (Opp. 6)

was completed, is contradicted in the next paragraph of its argument (Opp. 7). Respondent accomplishes this by stating that ATF has proposed altering its regulations to permit a licensed dealer to sell firearms at a gun show within the same state as the dealer's licensed premises. This rulemaking proceeding will not, however, contrary to Respondent's position, put to rest Petitioner's claim that a dealer selling at a gun show is unlicensed and, therefore, not properly charged if charged with failure to complete Form 4473. Rather, this rulemaking proceeding further confirms that a licensed federal firearms dealer is not now and was not in 1977 permitted to conduct his business at a gun show.[1]

It is, moreover, by no means certain that ATF will issue such regulations, especially since it previously advanced this idea, but did not follow through: Advance Notice of Proposed Rulemaking, No. 343, 45 Fed. Reg. 26982 (1980). In any case, it is also apparent that ATF does not have the authority to promulgate regulations to permit dealers to engage in business at gun shows. Notice of Proposed Rulemaking No. 487, 48 Fed. Reg. 44088 (1983), cited by Respondent (Opp. 7), states at 44089 that it "proposes regulations to allow licensees to sell firearms and ammunition at gun shows under the same license issued for their permanent address."[2] 18 U.S.C.

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[1] Respondent seems to suggest (Opp. 7, n.2) that Petitioner should have transferred the firearms to Schoen at his business premises. This is not correct, however, since the firearms were owned by Petiitoner in his personal capacity and were not part of his business inventory. If the guns had been part of his business inventory, it would have been necessary, when he transferred them at his business premises, to complete Part I of Form 4473 for an "Intra-State Over-the-Counter Transaction" (App. M, 63a). Petitioner also would not have been permitted, contrary to Respondent's suggestion, to mail the guns to Schoen under any condition, because of 18 U.S.C. 1715, *supra*, which prohibits the mailing of firearms capable of being concealed on the person. All the guns sold to Schoen were handguns capable of being concealed on the person.

[2] This Notice of Proposed Rulemaking was published on September 27, 1983. The Petition for Certiorari in this case was filed on September 13, 1988.

923, however, requires that a dealer have a separate license for each place at which he does business (Pet. ix). This has long been ATF's construction of section 923. Revenue Ruling 69-59 (Pet. xiv). This view was enunciated by the Second Circuit in *United States v. Ruisi*, 460 F.2d 153, 154, when it stated:

> Under the federal statute, an enterprise dealing in firearms must obtain a license for each location at which it sells guns. It cannot obtain a temporary license to sell firearms at a location other than at its *bona fide* business location. For example, a licensed dealer cannot obtain a license to deal in firearms at a trade show or gun show if that show is held at a location other than the site of the dealer's licensed business.

This language from the opinion of the Second Circuit also clearly demonstrates that that court carefully considered the propriety of the charges against the defendants and had not merely "assumed" their propriety as Respondent asserts (Opp. 7, n.3). It is also not surprising, contrary to Respondent's assertion, that the defendants in *Ruisi* did not challenge their convictions under 18 U.S.C. 922(a) (Pet. vii), for dealing in firearms without a license since, as the Court of Appeals pointed out, the record contained "overwhelming evidence" to support this finding (460 F.2d at 155). Indeed, had Petitioner in this case completed a Form 4473 for each of the sales to Schoen, as did the defendants in *Ruisi* for each of their sales, there would be overwhelming evidence that he had engaged in business without a license in violation of 18 U.S.C. 922(a).

2. The most astounding of Respondent's assertions is (Opp. 7, n.3) that there is no conflict over whether the Petitioner's conduct was illegal and that therefore it makes no difference under what subsection of 18 U.S.C. 922 he was convicted. Respondent insists that Petitioner's conviction of violating 18 U.S.C. 922(c) should not be reviewed, since he violated 18 U.S.C. 922(a), and that the difference between the two crimes is merely an error

in citation. First, there is most assuredly a conflict over whether Petitioner's conduct was illegal, since Petitioner contends he did not violate 18 U.S.C. 922(c), the statute upon which his conviction was based. Second, he cannot be guilty of violating 18 U.S.C. 922(a), since he has not been charged with, and convicted of, that offense. To characterize the difference between a charge of dealing in firearms without a license in violation of 18 U.S.C. 922(a), and a failure to complete Form 4473 for a mail order sale in violation of 18 U.S.C. 922(c), as merely an error in citation, is incomprehensible, as each subsection makes crimes of acts which are entirely distinct.

The Respondent is, moreover, incorrect in stating (Opp. 9) that had Petitioner not been a licensed dealer, Petitioner's course of conduct would have subjected him to prosecution for dealing in firearms without a license. A correct statement would be that since Petitioner was not licensed to deal in firearms at the gun shows, it would have been appropriate to conduct an investigation to determine whether Petitioner was making more than an occasional sale of a firearm and whether there was sufficient evidence to prosecute him for dealing in firearms without a license in violation of 18 U.S.C. 922(a).[3] The investigating agents, however, chose to investigate under an incorrect theory and to apply for a search warrant in the mistaken belief that Petitioner had violated 18 U.S.C. 922(c). The prosecutor then fell into the same error. It is understandable, although not excusable, that the investigating agents and the prosecutor did not realize that the language of 18 U.S.C. 922(c) referred to mail order sales. It is shocking, however, that this error should be so tenaciously defended in this court by Respondent. Plainly, a confession of error would be appropriate in this case, rather than an insistence that Petitioner's con-

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[3] As stated in *your 1977 guide to*—FIREARMS REGULATION (Pet. xiv), a nonlicensed resident of the state in which a gun show is being held may make an occasional sale of a firearm to another nonlicensee residing in his state, as long as he is not engaging in the business.

viction under 18 U.S.C. 922(c) should stand since he may have violated 18 U.S.C. 922(a), an entirely separate crime with which he has never been charged or of which he has never been convicted. Respondent's position indeed underscores the necessity stated in the Petition (Pet. 16), for this Court to give the Government and the Courts of Appeals guidance concerning the proper construction of the technical record-keeping provisions of the Gun Control Act of 1968.

Also, contrary to Respondent's assertion, *United States v. Ruisi*, *supra*, and this case are in direct and irreconcilable conflict as explained in the Petition (Pet. 12). It is, moreover, not surprising that the Respondent is not aware of any reported decision, subsequent to *Ruisi*, holding that a licensed dealer is unlicensed when he makes sales off his premises, since that point is manifestly clear from a reading of the Gun Control Act and accompanying regulations, as also explained in the Petition (Pet. 14)[4], and has, therefore, not needed to be the subject of judicial construction.

3. Respondent also resorts to a claim of error-in-citation in an attempt to reconcile inconsistent charges in the indictment under which Petitioner was convicted. Petitioner's convictions under Counts One through Four and also Count Seven are based on allegations that when he sold the five firearms to Schoen, he failed to comply with 18 U.S.C. 922(c), which compliance is accomplished by completing Part II of Form 4473, relating to mail order transactions (Pet. 5, n.3). On the other hand, his convictions under Counts Eight through Twelve, in connection with the same five sales, are based on allegations that he failed to comply with 18 U.S.C. 923 and 27 C.F.R. 178.124(a) and 178.124(c), which

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[4] *Your 1977 guide to*—FIREARMS REGULATION (Pet. xiii), which is made available to all licensed dealers, informs dealers that they may not complete sales at Gun Shows. Completion of the sale, of course, is accomplished by the transfer of the firearm over-the-counter at the dealer's premises, together with the execution of Form 4473, Part I, which must accompany each such transfer.

compliance is accomplished by completing Part I of Form 4473, relating to over-the-counter transactions (Pet. 6, n.4). Respondent now claims (Opp. 10-11) that the citation of 27 C.F.R. 178.124(c), which deals with over-the-counter transactions, in each of Counts Eight through Twelve, was a "miscitation." Respondent, however, should not be allowed to resort to the error-in-citation tactic in this instance anymore than in its attempt to confuse 18 U.S.C. 922(a) and 18 U.S.C. 922(c). Petitioner was entitled to, and did, rely upon this citation, and to assume that the prosecutor did not intend to charge two identical counts for each sale. Petitioner, moreover, has consistently taken the position that he was not required to complete Form 4473 for the sales of his personal firearms away from his business premises. The reasons for his position that the Gun Control Act clearly distinguishes personal firearms from business inventory has been thoroughly explained in the Petition (Pet. 16), together with the suggestion that the Government and the Courts of Appeals need the guidance of this Court concerning the technical record-keeping provisions of the Gun Control Act of 1968.

A review of the indictment as a whole, moreover, refutes any suggestion that the reference to 27 C.F.R. 178.124(c) was a "miscitation." Counts One through Four and Count Seven (App. I, 42a-45a) allege, in the charging paragraph, a failure to comply with the requirements of 18 U.S.C. 922(c), and cite 18 U.S.C. 922(c) and 924(a) beneath that paragraph. Clearly, this directs a defendant to 18 U.S.C. 922(c), its implementing regulation 27 C.F.R. 178.96, and its implementing Form, Part II of Form 4473. It is obvious that 18 U.S.C. 922(c) can be complied with only by executing Form 4473, Part II, which, in its text, contains the sworn statement language of section 922(c). (App. N, 65a) These counts also reflect that the prosecutor knew how to draft a charge under 18 U.S.C. 922(c).

Count Eight through Twelve (App. I, 45a-48a) on the other hand allege, in the charging paragraph, violations

based on failure to keep records pursuant to 18 U.S.C. 923 and 27 C.F.R. 178.124(a). 18 U.S.C. 923(g) (Pet. ix) requires that dealers "maintain . . . such records of . . . sale, or other disposition, of firearms . . . as the Secretary may by regulations prescribe." These five counts, unlike the first five, depend on 18 U.S.C. 922(m) and 923 (Pet. ix). 18 U.S.C. 922(m) makes it unlawful to fail to maintain records required pursuant to section 923 or regulations promulgated thereunder. The citation of 27 C.F.R. 178.124(c) was obviously placed under the charging paragraph to direct attention to the specific regulation and particular form (Form 4473, Part I) which the defendant allegedly failed to maintain since section 923, unlike section 922(c), does not spell out details for compliance in its text. The citation of 27 C.F.R. 178.124(c) was very appropriate, as were the other citations under these counts: 18 U.S.C. 922(m), 18 U.S.C. 923, 18 U.S.C. 924(a) and 27 C.F.R. 178.124(a). The citation of 27 C.F.R. 178.124(c) made it crystal clear that Counts Eight through Twelve referred to Part I of Form 4473. Obviously, in any event, these counts could not have been intended to charge the failure to prepare Part II of Form 4473, the only other part of the Form which exists, since Counts One through Four and Seven, drafted entirely differently, had already so charged. The inconsistency therefore remains and is not, as Respondent asserts "of no practical consequence," since Petitioner, who was not obliged to complete either of the two parts of Form 4473, remains a convicted felon.

4. Respondent also makes other statements which require correction.

First, Respondent describes Gordon Schoen, the person to whom Petitioner transferred the firearms in this case, as an "undercover agent" for ATF (Opp. 2). There is no evidence, however, that Schoen used other than his true name or that he had utilized any "cover" story in his dealings with Petitioner. Such an unwarranted description of Schoen, when coupled with Respondent's recitation of congressional concerns in enacting the Gun

Control Act (Opp. 5-6), incorrectly suggests that ATF was doing more than trolling at gun shows, attempting to "make cases" against hobbyists under the technical *mala prohibita* strictures of the Gun Control Act.

Second, Respondent has suggested, in stating that Petitioner "failed" to record the sale of a firearm in his "personal weapons log" (Opp. 2), that Petitioner committed an unlawful act. This is incorrect, since Petitioner was under no legal obligation to maintain a "personal weapons log".

Third, Respodent, in observing that none of the guns sold to Schoen on September 25, 1977 (Opp. 2) was recorded in his dealer's firearms record book, incorrectly suggests that Petitioner wrongfully failed to record the sales. The significance of the fact that the guns had not been entered in the dealer's record book is that they had never been acquired by Petitioner's business. He was, therefore, under no obligation to record these sales to Schoen as dispositions by the business. Significantly, Petitioner was not charged with failure to record in his dealer's record book, as acquisitions or dispositions, the guns sold to Schoen.

Fourth, Respondent attempts (Opp. 3) to impute to Petitioner an intent improperly to make unrecorded sales by referring to transcripts of two consensually recorded telephone conversations between Schoen and Petitioner, one in October 1977 and one on December 6, 1977, in which Petitioner allegedly agreed to make sales "off paper." There was, however, only one consensually recorded telephone conversation, the conversation of December 6, 1977. The ATF agent who prepared the affidavit in support of the search warrant has admitted that Schoen did not use the term "off paper" in his telephone conversation with Petitioner (App. P. 73a, Pet. 7 and n.5).

Fifth, contrary to Respondent's assertion (Opp. 13), Petitioner relied on the advice of an ATF inspector, not upon *your 1977 guide to*—FIREARMS REGULATION, in sell-

ing firearms owned in his personal capacity without preparing a Form 4473. The *guide*, however, confirms that the advice was correct (Pet. 22, n.16). Similarly, the Krogman letter (Pet. App. K, 56a) was not relied upon by Petitioner in making the sales, but corroborates the fact that Petitioner indeed received advice from the ATF inspector and that that advice was correct. Moreover, as previously explained (Pet. 9), former ATF Director Dickerson's letter purporting to disavow the Krogman letter did not actually do so because the material he submitted to corroborate his letter actually contradicted it (Pet. 9-10, App. L, 62a). The sample entry and instructions referred to in Mr. Dickerson's letter explain the transfer by a dealer of a personal firearm to a certified law enforcement officer. The dealer is instructed, and the sample entry illustrates, that he need not prepare Form 4473, but must enter the transaction in his dealer's record book.

CONCLUSION

For the reasons set forth herein and in the Petition, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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